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"To A Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850

by

BARBARA J. SHAPIRO*

In many American jurisdictions the jury is instructed that the prosecution must prove the defendant's guilt "beyond a reasonable doubt and to a moral certainty." At first glance, "to a moral certainty" appears to be one of those typical redundancies of common law that seek to cure ambiguity by compounding it. Because it troubles us that "beyond reasonable doubt" conveys no very precise meaning, we add a second phrase, "to a moral certainty," but it conveys even less meaning and makes our whole problem worse. Only a few quite well-educated older people who have read a great deal of nineteenth-century literature are likely even to have said, "I am morally certain that you left your coat in the restaurant" or "Are you morally certain that you came into the room before he did?" It is the kind of phrase that a screenwriter might put in the mouth of a country storekeeper to suggest a slightly bookish, straight-laced, religious old man still living in an earlier age. Even those few people who might use the phrase would be using the word "moral" as a kind of pretentious substitute for "very." If most of us understand the question "Are you morally certain?" at all, we understand it as "Are you very certain?"

In recent years, a great deal of jurisprudential concern has centered on the ambiguity of the various forms of instruction which surround "reasonable doubt" with a bouquet of elaborations and explanations. Justice Stanley Mosk's concurrence in the California case of *People v. Brigham*¹ has been a catalyst for this growing concern. Justice Mosk's view is now incorporated in a bill before the California legislature. It would strip everything except the phrase "reasonable doubt" itself from

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1. 25 Cal. 3d 283, 292-316, 599 P.2d 100, 107-21, 157 Cal. Rptr. 905, 913-27 (1979) (Mosk, J., concurring).

the instruction. There can be little doubt that the California activity presages a national trend. In all of this activity, "moral certainty" has been singled out as a particular villain. Justice Mosk has issued a challenge: "I'd like to hear someone attempt to tell . . . [us] what 'moral certainty' is."²

I think I can respond to this challenge. The remainder of this article tells what the concept of moral certainty is by tracing the intellectual origins of the phrase and the ways in which it entered and has been preserved by the law. One purpose of the enterprise is purely scholarly and is directed to an abiding question of legal theory: to what extent does the law develop autonomously and to what extent does it borrow its key ideas from other areas of thought? A second purpose, however, is to contribute to the current policy debate over changing the jury instruction. To briefly anticipate my conclusion here, an examination of the intellectual history of "moral certainty" supports the conclusion that the phrase does not convey to contemporary jurors what it was intended to convey when it was introduced. On the other hand, the key ideas that the phrase was designed to convey can be understood by modern jurors and continue to be as important to the jury's process of reaching conclusions as they were when the phrase was introduced. Thus, the history of moral certainty that follows does suggest that the phrase ought to be dropped, but it also suggests that a substitute ought to be introduced and what the substance of that substitute should be.

Whether legal change is ever an autonomous development driven by its own internal dynamics rather than caused by other economic, social, and intellectual forces is a subject of never-ending debate in the community of legal scholars. Common lawyers have always thought that the very heart of the common law was procedure and thought of themselves as experts at procedure even if expert at nothing else. We should expect then that if any part of the history of common law should exhibit autonomous development it should be the history of the law of procedure and, most especially, that procedure which involves the most peculiar and deeply embedded feature of the common law, the jury. It is the purpose of this study to show that certain very crucial developments of the procedural law of juries have been molded, both in form and content, by extra-legal intellectual developments.

Common-law jurisdictions observe two kinds of rules of evidence. The first, which deals with what kinds of evidence may get to the jury when and in what form, can be understood without much reference to

2. San Francisco Chron., May 6, 1986, at 9, col. 1.

nonjury developments. The second deals with the evaluation by the jury of the evidence, and how it is to decide whether there is sufficient probative evidence to justify a verdict. Such rules are drawn from the culture's general understanding of how we "know" things to be true. This paper deals with this second variety and its relation to developments in epistemology in seventeenth-century England.

I

The seventeenth-century intellectual crisis which resulted from a growing dissatisfaction with scholastic philosophy and from the threat of skepticism was not the first to influence rules of evidence. A much deeper crisis occurred during the twelfth century when "irrational proofs," such as trial by ordeal, could no longer be seen as consistent with justice or with how truth determinations ought to be made. "Irrational proofs" were replaced on the Continent by the Roman-canon inquisition process and in England by the jury trial.

The "rational" system of proof of the Roman-canon inquisition process was operated by professional judges who sought to obtain "full proof" by applying clearly established evidentiary standards which rigidly specified the quality and quantity of proof. A specified number of witnesses were required to prove facts and once "full proof" had been achieved conviction was automatic. The judge was essentially an accountant who totaled the proof fractions. Criminal cases, for example, required two good witnesses or confession. Since confession was of particularly high evidentiary value, torture was employed to assist in producing it. Complex rules determined whether there was sufficient evidence to justify judicial torture. Because the philosophical components in the Roman-canon system had been provided by late medieval scholastic philosophers and because the system had become well-entrenched on the Continent during that period, it seems to have been relatively uninfluenced by the epistemological issues that became acute in the early modern period.

In England "irrational proofs" were replaced by the jury trial, which initially required little in the way of rules of evidence. Jurors, men of the neighborhood, were assumed to know the facts and to incorporate their own knowledge into the verdict. Juries thus arrived at findings of fact guided by common sense and common knowledge.

As society became more complex and mobility increased, however, juries became less familiar with the facts and came to rely on the testimony of witnesses. Juries did not give up the right to consider personal knowledge in reaching verdicts but increasingly relied on witnesses and

documents which had to be evaluated for truthfulness and accuracy. Jurors became third parties who had to employ their rational and analytical faculties to reach conclusions about facts and events they had not personally witnessed or previously known. A turning point occurred in 1563 when legislation compelled the attendance of witnesses and made perjury a crime.³ As witnesses became more important, juries increasingly required standards for the evaluation of testimony. Notions of credibility, borrowed in part from the civil and canon law, began to appear, although for a time there was confusion between the concepts of legal and credible witnesses—the former being legally competent to testify, the latter being those whose testimony is believable. Discussions of witness credibility and the evaluation process thus entered the legal literature and the cases as the character of the jury trial was modified. The work of Sir Matthew Hale indicates that, by the late seventeenth century, the distinction between legal and credible witnesses was very clear.⁴

The response to this new legal environment was slow, but when the law of evidence emerged in the eighteenth century, it had been shaped not only by legal tradition but by the intellectual environment. We must therefore turn to the intellectual currents which would bear on how juries might reach rational conclusions based on evaluations of fact.

By the sixteenth century, humanist critiques had made the defects of scholastic philosophy and logic commonplace, though they did little to develop a substitute. The revival of skepticism was philosophically more serious since it might have entailed not only a repudiation of scholasticism but of religious doctrine, the validity of sense data, reports of events, indeed any claims to knowledge.⁵ Philosophers, notably Descartes and Bacon, attempted to overcome the skeptical critique and the defects of scholasticism by re-founding knowledge on a certain but nonscholastic basis. Cartesianism denied that knowledge provided by the senses might be certain and devalued disciplines dependent on experiment or testimony. It therefore had little impact on law. Bacon's new empirical philosophy emphasized appropriately filtered and manipulated

3. For the best discussion of the evolution of the jury trial, see generally T. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH TRIAL JURY 1200-1800* (1985). Jurors were required to be of the vicinity until 1705.

4. M. HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* at xxviii-xxix, 346-47 (6th ed. London 1820); M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 277 (London 1736) [hereinafter M. HALE, *PLEAS OF THE CROWN*]; see also M. HALE, *THE PRIMITIVE ORIGINATION OF MANKIND* 128 (London, 1677) [hereinafter M. HALE, *PRIMITIVE ORIGINATION*]; Shapiro, *Law and Science in Seventeenth Century England*, 21 *STAN. L. REV.* 727, 757-60 (1969).

5. See R. POPKIN, *THE HISTORY OF SCEPTICISM FROM ERASMUS TO SPINOZA* (1979).

sense data, but also sought absolutely certain axioms and universally valid generalizations.⁶

The seventeenth-century English philosophic and scientific community, however, was neither Baconian nor Cartesian, for it did not claim that empirically derived facts would yield absolutely certain knowledge. It attempted to verify natural phenomena by experiment, direct observation, and testimony, and believed that these techniques, depending on the quality and the quantity of the evidence derived, might yield conclusions sufficiently true to serve as the basis for the conduct of human affairs.

The attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion, was made by an overlapping group of theologians and naturalists. For the Protestant theologians, who rejected Catholic assertions of infallibility, the central question was whether religious truths such as the existence of God, miracles, the Biblical narratives, and various doctrines and practices of the Church could survive skeptical attack, once stripped of claims to absolute truth and reduced to claims based on evidence. For the naturalists the central problem was that of making truthful statements about natural phenomena which could be observed but could not be reduced to the kinds of logical, mathematical demonstrations that traditionally had been held to yield necessary, unquestionable truth. Both groups concluded that reasonable men, employing their senses and rational faculties, could derive truths that they would have no reason to doubt.⁷

Although terminology varied, English naturalists and theologians distinguished between "knowledge" or "science" on the one hand and "probability" on the other. They identified three sub-categories of knowledge, each possessing a different kind of certainty: physical, derived from immediate sense data; mathematical, established by logical

6. Bacon was not only an important philosopher of science but also a prominent legal figure. He was Lord Chancellor and played an important role in the movement for reform. See Shapiro, *Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform*, 24 AM. J. LEGAL HIST. 331, 331-62 (1980). For works linking Bacon's philosophy of science to the law, see Kocher, *Francis Bacon and the Science of Jurisprudence*, 8 J. HIST. IDEAS 3-26 (1957); Wheeler, *The Invention of Modern Empiricism: Judicial Foundations of Francis Bacon's Philosophy of Science*, 76 LAW LIBR. J. 78-120 (1983); Kenneth Cardwell, *Francis Bacon and the Inquisition of Nature* (Apr. 1986) (unpublished paper delivered at the Pacific Coast Conference of British Studies).

7. For a more complete discussion see R. BURNS, *THE GREAT DEBATE ON MIRACLES* 19-40 (1981); B. SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW AND LITERATURE* (1983); H. VAN LEEUWEN, *THE PROBLEM OF CERTAINTY IN ENGLISH THOUGHT 1630-1690* (1963); R. WESTFALL, *RELIGION AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND* (1958).

demonstration such as the proofs in geometry; and moral, based on testimony and secondhand reports of sense data. This moral certainty was most relevant to law, history, and many kinds of natural science. Although they did not depend on evidence that compelled assent, moral certainties might be so clear that everyone "whose judgment is free from prejudice will consent unto them. And though there be no natural necessity, that such things be so, and that they cannot possibly be otherwise . . . yet may they be so certain as not to admit of any reasonable doubt concerning them."⁸

"Probability" traditionally had lumped together the noncertain, the seemingly true, and the merely likely. When evidence was unclear or reasonable doubt existed, the result was probability or mere opinion, not knowledge. A late seventeenth-century development suggested that probability consisted of a graduated scale that extended from the unlikely through the probable to a still higher category called "rational belief" or "moral certainty." This latter category, sometimes treated as "knowledge" and sometimes as the highest category of probability, was to have a great impact on the law.⁹

We must make particular mention of John Locke, both because the systematization of this approach in his 1690 *Essay Concerning Human Understanding* became so influential and because the first treatise writers on legal evidence attempted to build on Lockean foundations. What others called moral certainty was for Locke a species of probability, the very highest level of which commanded universal assent. It rose "so near to a certainty" that it governed one's thinking "as absolutely . . . as the most evident demonstration." Lower levels of probability produced "confidence," "confident belief," or "mere opinion." The level of assent was determined by the weight of the evidence.¹⁰

8. J. WILKINS, OF THE PRINCIPLES AND DUTIES OF NATURAL RELIGION 7-8 (London 1675) (Moral certainty "may properly be styled indubitable."); see also *id.* at 10-11; W. CHARLETON, IMMORTALITY OF THE HUMAN SOUL 186 (London 1657). The "reasonable man" will not require demonstration or proofs that "exclude all Dubiosity, and compel assent," but will accept moral and physical proofs that are the best that may be gained. One could gain a "competent certitude where demonstration is impossible . . ." *Id.* at 186-88.

9. See D. PATEY, PROBABILITY AND LITERARY FORM (1984); B. SHAPIRO, *supra* note 7, at 163-93; Shapiro, *supra* note 4, at 727; Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299 (1959).

10. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. IV, ch. XVI (London 1690).

The highest degree of Probability is, when the general consent of all Men, in all Ages . . . concurs with a Man's constant and never-failing Experience in like cases, to confirm the Truth of any particular matter of fact attested by fair Witnesses . . . These Probabilities rise so near to Certainty, that they govern our Thoughts as abso-

For the new scientists and philosophers, natural phenomena and processes were to be verified by experiment, observation, and the testimony of observers. Depending on the quality and quantity of the evidence produced by these methods, one might reach findings of fact and sometimes even conclusions that no reasonable person could doubt.¹¹

Historians too were attracted to this approach. Discussions of both historical events and Scripture frequently centered on the extent to which one might believe the testimony of witnesses reporting on past occurrences. References to eye-and-ear witnesses, hearsay, and credible witnesses were common. This language of course suggests the courtroom. Indeed, naturalists, theologians, and historians often employed courtroom imagery. Historians were thus frequently admonished to act as un-

lutely . . . as the most evident demonstration . . . [W]e make little or no difference between them and certain knowledge. . . .

[The] *next degree of Probability* is, when I find by my own Experience, and the Agreement of all others that mention it, a thing to be for the most part so, and that the particular instance of it is attested by many and undoubted Witnesses: v.g. History giving us such an account of Men in all Ages, and my own Experience, as far as I had an opportunity to observe, . . . and in this case our Assent has a sufficient foundation to raise itself to a degree, which we may call *Confidence*. . . .

[A still lower category existed] when any particular matter of fact is vouched by the concurrent Testimony of unsuspected Witnesses, there our Assent is also unavoidable. . . . This, though in the nature of things there be nothing for nor against it; yet, being related by Historians of credit, and contradicted by no one Writer, a Man cannot avoid believing it, and can as little doubt of it as he does of the Being and Actions of his own Acquaintance, where he himself is a Witness. . . .

[In all three of these categories] the matter goes easy enough. Probability upon such grounds carries so much evidence with it that it naturally determines the Judgment, and leaves us as little liberty to believe or disbelieve, as a Demonstration does. . . . The difficulty is, when Testimonies contradict common Experience, and the report of History and Witnesses clashes with the ordinary course of Nature, or with one another; there it is, where Diligence, Attention, and Exactness is required, to form a right Judgment, and to proportion the Assent to the different Evidence and Probability of the thing; which rises and falls, according as those two foundations of Credibility, viz. Common Observation in like cases, and particular Testimonies in that particular instance, favours or contradicts it. . . .

[These, however, were] liable to so great variety of contrary Observation, Circumstances, Reports, different Qualifications, Tempers . . . of the Reporters, that it is impossible to reduce to precise Rules the various degrees wherein Men give their Assent. This only may be said in general, that as the Arguments and Proofs, *pro* and *con*, upon due examination, nicely weighing every particular circumstance, shall to any one appear, upon the whole matter, in a greater or lesser degree to preponderate on either side; so they are fitted to produce in the Mind such different entertainments, as we call *Belief, Conjecture, Guess, Doubt, Wavering, Distrust, Disbelief, etc.*

Id. §§ 6-9 (emphasis in original). This is followed by a discussion of attesting documents and copies of documents, and hearsay evidence. *Id.* § 10.

11. See B. SHAPIRO, *supra* note 7, at 15-73.

biased and impartial judges rather than partisan advocates.¹²

Seth Ward, in comparing sacred and secular history, for example, emphasized that when witnesses related improbable events, it was particularly important to evaluate critically the relators and the manner of their relations. It was necessary to determine whether the event in question was knowable, whether the parties had sufficient means to obtain such knowledge, whether the relators were "eye or ear" witnesses and whether the occurrences "were publically acted and known." Historians might be believed if the relators had the opportunity to observe the events in question and no one had contradicted their accounts. Although fabrications were possible, there was little reason, given the lack of conflicting accounts, to doubt the events reported in secular history or the "History of Holy Scripture." Ward, in what became commonplace among historians and Anglican ecclesiastics in the late seventeenth century, thus argued that no impartial person could reasonably doubt the truthfulness of Biblically reported events and matters of fact.¹³ Virtually the same line of argument based on the absence of "reasonable doubt" rather than absolute certainty was advanced by Edward Stillingfleet, an Anglican divine who wrote widely on theological and epistemological issues, to establish the moral certainty of Scriptural history.¹⁴

By the early eighteenth century these views were commonplace among historians and required little defense or comment. Thus, Joseph Addison noted that secular historians were guided by

the common rules of historical faith, that is, they examined the nature of the evidence which was to be met within common fame, tradition, and the writings of persons who related them, together with the number, concurrence, veracity and private characters of those persons; and being convinced, upon all accounts that they had the same reason to believe the history of our Saviour as that of any other person to which they were not actually eyewitnesses, they were bound by all the rules of historical faith, and of right reason, to give credit to this history.¹⁵

By 1690, when Locke's *Essay Concerning Human Understanding*

12. *Id.* at 140-49, 155-59.

13. S. WARD, A PHILOSOPHICAL ESSAY TOWARD AN EVICTION OF THE BEING AND ATTRIBUTES OF GOD 84-88, 90, 99-101, 102, 117 (5th ed. London 1677) (1st ed. London 1654).

14. E. STILLINGFLEET, ORIGINES SACRAE (London 1662); see also R. CARROLL, THE COMMON-SENSE PHILOSOPHY OF BISHOP EDWARD STILLINGFLEET 1635-1699 (1975); S. PARKER, A DEMONSTRATION OF THE LAW OF NATURE AND OF THE CHRISTIAN RELIGION at xxvii, xxix, 176, 179 (London 1681); Popkin, *The Philosophy of Bishop Stillingfleet*, 9 J. HIST. PHIL. 303, 303-19 (1971).

15. 1 J. ADDISON, THE WORKS OF THE RIGHT HONORABLE JOSEPH ADDISON 420 (London 1721).

appeared, ideas of witness credibility had become familiar to lawyers, naturalists, theologians, and historians. Locke's criteria for evaluating testimony, "the number of witnesses, their integrity, their skill at presenting evidence, and its agreement with the circumstances, and lastly, the presence or absence of contrary testimony," had obvious relevance for the law.¹⁶ A considerable portion of the English intellectual community adopted this empirical approach to knowledge—which neither denied the possibility of gathering reliable and persuasive evidence nor made claims to absolute certitude. This approach also came to serve the needs of the English legal system.

As we have already seen, initially there had been little need to construct a rationale for the truth-finding capacities of juries who reached verdicts based on their own common sense and knowledge of the facts. As the role of witnesses increased in the late medieval and early Roman period, the problem of the credibility of second-hand reports of facts that had become central to theologians, naturalists, and historians became central to legal theorists who borrowed conceptual elements from the new empirical philosophy.

Sir Matthew Hale, the most distinguished judge of the mid- to late seventeenth century, thus emphasized the superiority of the jury trial as "the best Method of searching and sifting out the Truth," precisely because juries might "weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies."¹⁷ Hale, however, not only emphasized credibility but made the distinction between legal and credible witnesses very clear. Hale indicated that if jurors had

just cause to disbelieve what a Witness swears, they are not bound to give their Verdict according to the Evidence, or testimony of that witness; and they may sometimes give Credit to one Witness, tho[ugh] opposed by more than one. And indeed, it is one of the Excellencies of . . . [the jury trial] above the Trial by Witnesses, altho[ugh] the jury ought to give a great Regard to Witnesses and their Testimony, yet they are not always bound by it; but may either upon reasonable Circumstances, inducing a Blemish upon their Credibility, tho[ugh] otherwise in themselves in Strictness of Law they are to be heard, pronounce a Verdict contrary to such Testimonies, the truth whereof they have just Cause to suspect, and may and do often pronounce their Verdict

16. J. LOCKE, *supra* note 10, bk. IV, ch. XV, § 5. Locke's criteria may owe something to canon and civil law—suggesting the mutual influence of philosophy and law. See also R. BURNS, *supra* note 7, at 59-61.

17. M. HALE, *THE HISTORY OF THE COMMON LAW* 164-65 (C. Gray ed. 1971). Civil law judges in contrast were "precisely bound by rules." *Id.* at 164. Sir Edward Coke had little to say about credibility, although he noted that jurors were to consider the credit "upon the exceptions taken against him." E. COKE, *INSTITUTES* *6a.

upon one single testimony, which Thing the Civil Law admits not of.¹⁸

Hale's 1677 *Primitive Origination of Mankind* discussed evidence for matters of fact contained in Scripture in much the same way as in legal trials. It was necessary to weigh

the veracity of him that reports and relates it. And hence it is, that that which is reported by many Eye-witnesses hath greater motives of credibility than that which is reported by few; that which is reported by credible and authentic witnesses, than that which is reported by light and inconsiderable witnesses; that which is reported by a person disinterested, than that which is reported by persons whose interest is to have the thing true, or believed to be true; . . . and finally, that which is reported by credible persons of their own view, than that which they receive by hear-say from those that report on their own view.¹⁹

Belief for Hale rested on the direct experience of the senses and "upon the relation of another that we have no reasonable cause to suspect."²⁰ "Evidence of Fact and Things remote from our Sense," though not infallible, yet might be of such "high credibility, and such as no reasonable Man can without any just reason deny his assent unto them."²¹ While Hale did not use the words "moral certainty" or "beyond reasonable doubt," his terminology is consistent with those concepts.

II

Although some scholars have suggested that the medieval practice of treating all evidence given under oath as of equal weight continued into the eighteenth century,²² the state trials of the late seventeenth century and beyond are larded with judicial insistence that juries weigh the credibility of witnesses.²³ Issues of credibility, which became increas-

18. M. HALE, *supra* note 17, at 164. Hale also distinguished between lawful and credible witnesses. M. HALE, *PLEAS OF THE CROWN*, *supra* note 4, at 277. English juries did not have to "reject one Witness because he is single or always to believe the Witnesses if the Probability of the Fact does upon Circumstances reasonable encounter them." M. HALE, *supra* note 17, at 164.

19. M. HALE, *PRIMITIVE ORIGINATION*, *supra* note 4, at 129. The hearsay rule appears to date from about 1675-1690. Baker, *Criminal Courts and Procedure at Criminal Law, 1500-1800*, in *CRIME IN ENGLAND 1500-1800*, at 39 (J. Cockburn ed. 1977).

20. M. HALE, *PRIMITIVE ORIGINATION*, *supra* note 4, at 52, 128.

21. *Id.* at 128. In 1699, the Royal Society's *Philosophical Transactions* reported an effort to mathematize "moral certainty absolute," in which "the mind of man entirely acquiesces." 256 *PHILOSOPHICAL TRANSACTIONS* 359-65 (1699). The anonymous author attempted to rate the credibility of the reporter according to his integrity or fidelity and his double ability of "apprehending what is delivered" and of "retaining" it so it can be transmitted.

22. See, e.g., 9 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 196, 204-09 (1926); Wigmore, *The Required Number of Witnesses*, 15 *HARV. L. REV.* 83, 88-90 (1901).

23. See B. SHAPIRO, *supra* note 7, at 185-86; Shapiro, *supra* note 4, at 758-60. Prior to 1661 the law of treason required only the testimony of "lawful" not "credible" witnesses.

ingly central to criminal trials, also helped to shape the standard for the jury verdict. The "satisfied conscience" standard, initially a vague notion employed because the jury was on oath, became the vessel into which were poured the new criteria for evaluating facts and testimony. "Satisfied conscience" gradually became synonymous with rational belief, that is, belief beyond reasonable doubt. The newer standards borrowed heavily from religious and philosophical foundations, particularly from notions of moral certainty, or the highest degree of probability. This is not to say that juries, particularly in capital cases, had not always required convincing proof,²⁴ but rather that legal formulations concerning that conviction were increasingly stated in terms which were consistent with reigning epistemological formulations.

The recorded cases after 1668 exhibit sufficient repetition to suggest contemporary usage.²⁵ A number of phrases appear repeatedly in judicial charges. The first is "if you believe," the second, "if you are satisfied

Older views did not immediately disappear. Evidently few of the peers who had condemned the Earl of Stafford had "believed the witnesses." The witnesses had "sworn the facts" and therefore the peers claimed they had no choice but to accept them. Sometime after the trial, Judge North angrily informed the peers who had expressed this view that their behavior was "contrary to the very institution of trials." They must not try "the grammatical construction of words . . . but the credibility of persons and things . . . which required collection [sic] of circumstances and a right judgement . . . if you believe the witnesses find, else not." 1 R. NORTH, *THE LIVES OF THE NORTHS* 303-14 (A. Jessopp ed. 1890).

Confusion concerning the juries' treatment of witnesses was not the only type of difficulty. While it is clear that jurors had become judges of the facts, they were nevertheless entitled to know things on their own. If by 1650 one judge had ruled that a juryman who wished to present evidence must be heard on oath in court like any other witness, another in 1670 insisted that jurors might still act on their knowledge. See R. BAKER, *THE HEARSAY RULE* (1950) (citing *Benett v. Hartford*, 1 Style 233, 82 Eng. Rep. 871 (K.B. 1650)); *Bushell's Case*, 1 Vaughan 135, 149, 124 Eng. Rep. 1006, 1013 (C.P. 1670). In 1698 Judge Holt ruled, still somewhat tentatively,

In Case a Jury give a Verdict upon their own knowledge, they ought to tell the Court so, but the fairest way would be for such of the Jurors as had knowledge of the matter before they are sworn, to inform the court of the thing, and be sworn as witnesses.

1 Holt K.B. 404, 404, 90 Eng. Rep. 1122, 1122 (1698) (per curiam).

24. See T. GREEN, *supra* note 3, *passim*.

25. The English law reporting tradition did not include regular coverage of criminal trials during this period. The cases which do not appear in the nominate law reports rarely include the charge to the jury. The Proceedings at Old Bailey are too brief to be helpful; most report little except the verdict. Accordingly, most of the cases cited in this Article are taken from T.B. HOWELL, *COMPLETE COLLECTION OF STATE TRIALS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD* (London 1809-1826) (33 vols.) [hereinafter abbreviated Howell St. Tr.]. It is unfortunate that we must rely so heavily on *State Trials*, which are unevenly distributed over time and often involve emotionally laden political trials rather than more typical ones; however, there is no reason to believe that the bench in these cases employed atypical legal concepts or terminology.

or not satisfied with the evidence." A third is "satisfied conscience."²⁶ Verdicts were to be based on "belief," or "satisfied conscience," and were to be arrived at after evaluation of the evidence.

In *Bushell's Case*²⁷ Chief Justice Vaughan insisted that testimony and verdict were "very different things." A witness swears to what he has seen or heard while a jurymen swears "to what he can infer and conclude from the testimony . . . by the act and force of his understanding." By 1670 juries were already expected to be careful and thorough fact evaluators.

The Popish Plot trials, many of which gained wide circulation in pamphlet form, provide a substantial number of well-reported cases. The most common judicial directives to the jury included phrases such as "if you believe" or "if you believe on the evidence,"²⁸ "if you believe what the witness swore,"²⁹ and "if the evidence is sufficient to satisfy your conscience."³⁰ In some instances belief was linked to the satisfied conscience test.³¹

26. See, e.g., Trial of James, 6 Howell St. Tr. 67, 82 (K.B. 1660) (high treason); Trial of Dover, 6 Howell St. Tr. 539, 559; (Old Bailey 1663) (sedition); Trial of Turner, 6 Howell St. Tr. 566, 614, 615 (Old Bailey 1668) (burglary). Edward Waterhouse noted that the jury's verdict was "as they Think in their Conscience" the Truth of the facts after hearing the evidence. FORTESCUE ILLUSTRATUS 259 (1663). They were to "determine what their consciences judge clearly proved concerning the fact." *Id.*

27. 1 Vaughan 135, 149, 124 Eng. Rep. 1006, 1013, 6 Howell St. Tr. 999, 1006 (C.P. 1670). If judges could direct verdicts there would be no need for a jury. Chief Justice Vaughan also noted that juries might have personal knowledge of the case unknown to the judge and that jurors, like judges, might legitimately come to different conclusions after hearing the same evidence. Neither Vaughan nor his successors indicated how the formulation of belief in a single juror might be made compatible with the need for a unanimous verdict. For recent discussions of *Bushell's Case*, see T. GREEN, *supra* note 3, at 200-04; John Philip, Jurors and Judges in Late Stuart England: The Penn/Mead Trial and Bushell's Case (Apr. 1986) (unpublished paper delivered before the Pacific Coast Conference on British Studies).

28. See, e.g., Trial of Thompson, 8 Howell St. Tr. 1359, 1386 (N.P. 1682) (libel); Trial of Blague, 9 Howell St. Tr. 653, 666 (Old Bailey 1683) (high treason).

29. See, e.g., Trial of Lewis, 7 Howell St. Tr. 249, 255 (Monmouth assizes 1670) (high treason); Trial of Brommich, 7 Howell St. Tr. 715, 726 (Stafford assizes 1683) (high treason); Trial of Gascoigne, 7 Howell St. Tr. 959, 1041 (K.B. 1680) (high treason); Trial of Busby, 8 Howell St. Tr. 525, 550 (Derby assizes 1681) (high treason); Proceedings against Fitzharris, 8 Howell St. Tr. 243, 338 (K.B. 1681) (high treason); Trial of Lord Grey, 9 Howell St. Tr. 127, 178, 183 (K.B. 1682) (misdemeanor debauchery of Lady Berkeley); Trial of Ward, 9 Howell St. Tr. 299, 350 (K.B. 1683) (perjury); Trial of Rouse, 9 Howell St. Tr. 637, 654 (Old Bailey 1683) (high treason).

30. Trial of Green, 7 Howell St. Tr. 159, 220 (K.B. 1670) (murder); Trial of Wakeman, 7 Howell St. Tr. 591, 681, 686 (Old Bailey 1679) (high treason); Trial of Thwing, 7 Howell St. Tr. 1162, 1179 (York assizes 1680) (high treason); Proceedings against Fitzharris, 8 Howell St. Tr. 243, 338 (K.B. 1671); Trial of Bethel, 8 Howell St. Tr. 747, 810 (1681) (assault and battery).

31. See, e.g., Trial of Whitebread, 7 Howell St. Tr. 311, 414 (Old Bailey 1679) (high

Several well-known and much reprinted Whig political-legal writers employed the "satisfied conscience" test in 1680, a year when legal issues, grand jury indictments, and petty jury verdicts were much in the public eye as a result of the Exclusion crisis. Government efforts to prosecute leading Whig Exclusionists led to several dramatic trials. According to Sir John Hawles, a well-known Whig lawyer, a juror could not become "fully satisfied in the conscience" until he had carefully considered the matter, as well as the course of life of the testifier and the "credit of the Evidence."³² A satisfied conscience was thus closely linked to the credibility of the testimony. Hawles also insisted that juries must be "satisfied in [their] . . . particular Understanding and Conscience" of the "truth and Righteousness of . . . [a] verdict."³³ Juries thus must give verdicts "according to their Conscience and the best of their Judgment."³⁴ Echoing Chief Justice Vaughan, he noted that jurors must follow their own, not another's, "Understanding or Reasoning."³⁵

Henry Care, another Whig writing in 1680 about the political trials of the day, employed a similar "fully satisfied conscience" standard.³⁶ There is no question that Care, as well as Hawles and Vaughan, expected jurors to bring their reasoning faculties to bear on the evidence and testimony before them and that the term "satisfied conscience" was the term most often employed to denote a proper verdict.

The widespread use of the terminology of conscience in late seventeenth- and early eighteenth-century trials occurred at a time when Protestant discussions of conscience—that is casuistry—began increasingly to involve analysis of rational moral choice and rational decision-making. Protestant theologians and moralists of the late seventeenth century rejected both the doctrine of "casuistical probabalism" which had required

treason); Trial of Ireland, 7 Howell St. Tr. 79, 135, 751 (Old Bailey 1678) (high treason); Trial of Cellier, 7 Howell St. Tr. 1183, 1207 (Old Bailey 1680) (libel); Trial of Carr, 7 Howell St. Tr. 1111, 1130 (Guildhall 1680) (libel); see also Trial of Brommich, 7 Howell St. Tr. 715, 726 (Stafford assizes 1679) (high treason); Trial of Bethel, 8 Howell St. Tr. 747, 757 (1681) (assault and battery). In other instances juries were required not only to weigh the credibility of witnesses but to weigh and consider circumstantial evidence. See, e.g., Trial of Brommich, 7 Howell St. Tr. 715, 726 (Stafford assizes 1679) (high treason); Trial of Thwing, 7 Howell St. Tr. 1162, 1179-80 (York assizes 1680) (high treason).

32. See J. HAWLES, *THE ENGLISHMAN'S RIGHT: A DIALOGUE BETWEEN A BARRISTER AT LAW AND A JURYMAN* 11 (London 1680). This work was reprinted in 1693 and appeared in at least 12 English, Irish, and American editions in the eighteenth century.

33. *Id.* at 38.

34. *Id.* at 47.

35. *Id.* at 35.

36. H. CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE* 214 (6th ed. Providence, R.I. 1774) (1st ed. London 1680); see also T. WILLIAMS, *THE EXCELLENCY AND PRAEHEMINENCE OF THE LAWS OF ENGLAND* 18 (London 1680).

only a single authority to support a moral decision—a position associated with the Jesuits—and emotional or intuitive responses.³⁷ The examples of Jeremy Taylor and Samuel Pufendorf should suggest something of the intersection between legal concepts of “satisfied conscience” and similar concepts in the realm of moral theology and natural law.

Jeremy Taylor, whose lengthy treatise *Ductor Dubitantum* went through numerous editions, explained the role of the “satisfied” or “sure” conscience in moral theology.³⁸ What is most interesting for our purposes is Taylor’s repeated insistence that conscience is a function of the understanding, not of the passions. To go against conscience was “no other than as they do things against their reason.” The conscience was “the Mind” and was made primarily by “the Understanding.”³⁹ The “Sure” or “Right” conscience was characterized by “moral certainty,” a concept which, we have seen, was widely employed by natural theologians, natural philosophers, and historians. Thus Taylor’s discussion of conscience predictably asserted that if moral things were not capable of mathematical or demonstrative certainty, they might nevertheless be “very highly probable.”⁴⁰ The “practical judgment of a right conscience” was “always agreeable to the speculative determination of the understanding” and required “full persuasion.”⁴¹ Thus, a “sure” or “satisfied” conscience, according to the most respected late seventeenth-century English casuist, required the full persuasion achieved by means of the rational faculties.⁴²

The terminology of casuistry and moral theology also pervaded Samuel Pufendorf’s 1703 *Law of Nature and Nations*, which came to have a substantial following in England. Pufendorf began with a discussion of “moral entities” and the “certainty of moral science.” He was anxious to

37. See J. McADOO, *THE STRUCTURE OF CAROLINE MORAL THEOLOGY* (1949); T. WOOD, *ENGLISH CASUISTICAL DIVINITY IN THE SEVENTEENTH CENTURY* (1952). Casuistry refers to the methods of reaching ethical decisions in particular cases.

38. J. TAYLOR, *DUCTOR DUBITANTUM* 3 (London 1660).

39. *Id.* at 3-4.

40. *Id.* at 3.

41. *Id.* at 30, 55.

42. Taylor also discussed the “confident or erroneous conscience,” “the probable or thinking conscience,” and the “doubting conscience.” The first was described in much the same way as latitudinarians and natural philosophers described dogmatism and superstition. The “probable or thinking conscience,” which lay between the “sure” and “doubting” conscience, could, at least on certain occasions, be “made certain by accumulation of many probabilities operating the same persuasion.” *Id.* at 90. Such an accumulation of probabilities might be called “a moral demonstration.” It required that both sides of a question be examined by an unbiased will. Christianity might be proved by “moral demonstration.” *Id.* at 93-107. Taylor considered the “doubting conscience” to be a “disease” rather than a guide to human action. *Id.* at 157.

refute both the common opinion of the European learned community that moral knowledge lacked the certainty of philosophy and especially of mathematics, and the Hobbesian notion that ethics and politics were capable of demonstration.⁴³ What is interesting about Pufendorf for our purposes is the way in which he linked "conscience," a concept so important in English legal terminology, to the concepts of moral certainty and belief beyond reasonable doubt.

For Pufendorf the rightly informed conscience could derive from two sources: persuasion built on certain principles, or persuasion which is "true and certain; and sees no reason to doubt it."⁴⁴ The latter he explicitly related to the law. The concept of certainty beyond reasonable doubt is thus implicit in his argument from probabilities. Pufendorf thus argued for the "certainty of Moral sciences" and denied that they could "rise no higher [than] a probable Opinion." Moral knowledge or at least portions of it were not less certain mathematics.⁴⁵ Increasingly, conscience, casuistry, moral theology, and natural law were discussed in terms of moral certainty. Moral discussions, like religious belief, scientific findings, and historical evaluation, required a reasoned assessment based on the most complete information and evidence available. The "satisfied conscience" of the jurymen in the courtroom and that of the individual in his closet required rational, unbiased, and unemotional acts of the understanding.⁴⁶

The cases between 1683 and 1700 employed language similar to those of 1668-1683, although the number of judicial statements which linked believing the witnesses and reaching a satisfied conscience appeared more often than other formulations.⁴⁷ In law, conscience was

43. S. VON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 11, 17-18 (B. Kennet & W. Percivale trans. Oxford 1703).

44. *Id.* at 21.

45. *Id.* at 17.

46. It seems likely that concepts relevant to the law and philosophy of evidence may be traced by considering the evolution of moral theology, moral evidence, and discussions of evidence in the human and natural sciences. Samuel Clarke explicitly used the language of "satisfaction," "evidence of matter of fact," and "reasonable and sufficient proof" in connection with legal disputes and proofs of Christianity. S. CLARKE, *A DISCOURSE CONCERNING NATURAL RELIGION* 14, 331-34, 336-37 (3d ed. London 1711) (1st ed. London 1706).

47. Trial of Roswell, 10 Howell St. Tr. 147, 242 (K.B. 1684) (high treason); Trial of Lisle, 11 Howell St. Tr. 297, 370 (Winton 1685) (high treason); Trial of Grahme, 12 Howell St. Tr., 645, 810 (Old Bailey 1691) (high treason); Trial of Harrison, 12 Howell St. Tr. 833, 870 (Old Bailey 1692) (murder); Trial of Lord Mohun, 12 Howell St. Tr. 949, 1042 (H.L. 1692) (murder); Trial of Charnok, 12 Howell St. Tr. 1377, 1455 (Old Bailey 1696) (high treason); Trial of Parkyns, 13 Howell St. Tr. 63, 133 (Old Bailey 1696) (high treason); Trial of Rookwood, 13 Howell St. Tr. 139, 265 (K.B. 1696) (high treason); Trial of Cook, 13 State Trials 313, 393 (Old Bailey 1696) (high treason). In one perjury trial the jury was directed to "weigh and

"satisfied" only when the reasoning faculties were exercised upon the evidence. The question of "doubt" in the minds of the jury was rarely raised explicitly in the late seventeenth century.⁴⁸

The language of the 1700 to 1750 cases did not differ substantially, although references to conscience became fewer. It was the "mind" or "judgment" rather than the "conscience" which was to reach conclusions on the evidence. The need to be "satisfied," however, did not decline.⁴⁹ The most common directives employed "belief" based on evidence.⁵⁰ Judges insisted that verdicts be based on evidence and frequently admonished jurors to take great care in weighing and examining it. In several cases the terms "belief" and "satisfaction" were used synonymously. A guilty verdict was appropriate if the jurors "believed," an acquittal if they were not "satisfied."⁵¹ Notions of satisfaction and belief formed by evaluating evidence were the most common feature of jury charges in this period.⁵²

consider what is sworn now, and from thence to make a conclusion whether you are not satisfied that innocent blood has been spilt by means of this fellow." Trial of Oates, 10 Howell St. Tr. 1079, 1212 (K.B. 1685). "[T]ake care to examine strictly and impartially . . . and weigh the evidence which has been given on all sides [I]t is incumbent upon you to enquire whether you have not sufficient reason to be satisfied that the truth now is." *Id.* at 1212. "[I]f you think that the witnesses swear true, as I cannot see any colour of objection, there does not remain the least doubt . . . that the accused" was guilty. *Id.* at 1226. The accused in this case was Titus Oates.

48. In the *Trial of Stafford*, however, the prosecution indicated that "the evidence is so strong, that I think admits of no doubt." The proofs "[are] so clear and evident, as well leave no room to your lordships to believe" Stafford's protestations. Trial of Stafford, 7 Howell St. Tr. 1293, 1305, 1515, 1517 (H.L. 1680) (high treason). In the *Trial of Langhorn*, the Recorder indicated that there was not the "least reason for the most scrupulous men to doubt the credibility of the witnesses." TRIAL OF LANGHORN 67 (London 1679); *see also* Trial of Oates, 10 Howell St. Tr. 1079, 1211 (K.B. 1685) (perjury).

49. "If you are satisfied with the whole matter" was not an atypical formulation. Trial of Hurley, 14 Howell St. Tr. 377, 445 (K.B. 1701) (perjury); Trial of Layer, 16 Howell St. Tr. 93, 299 (K.B. 1722) (high treason). The phrase "the whole matter" refers to a combination of witness testimony and circumstantial evidence.

50. Trial of Fuller, 14 Howell St. Tr. 517, 535 (Guildhall 1702) (cheat and imposter); Trial of Dammaree, 15 Howell St. Tr. 521, 611 (Old Bailey 1710) (high treason); Trial of Willis, 15 Howell St. Tr. 613, 651 (Old Bailey 1710) (high treason); Trial of Layer, 16 Howell St. Tr. 93, 299 (K.B. 1722) (high treason); Trial of Acton, 17 Howell St. Tr. 461, 522 (Guildhall 1729) (murder); Trial of Godere, 17 Howell St. Tr. 1003, 1078-79 (Bristol assizes 1741) (murder); Trial of White, 17 Howell St. Tr. 1079, 1090 (Bristol assizes 1741) (murder).

51. Trial of Layer, 16 Howell St. Tr. 93, 299 (K.B. 1722) (high treason); Trial of Hales, 17 Howell St. Tr. 161, 208-09 (Old Bailey 1728) (forgery).

52. Occasionally, different terminology was employed. Thus one judge used, "if you are sensible and convinced." Trial of Franklin, 17 Howell St. Tr. 625, 675 (K.B. 1731) (seditious libel). Another indicated a guilty verdict was appropriate if they had no doubt upon the evidence. Trial of Hales, 17 Howell St. Tr. 209, 226 (Old Bailey 1728) (forgery). Doubt in the jury's minds was still not often mentioned in the charge.

The second half of the century presented a somewhat more complex but not fundamentally different picture. Judges and legal counsel began to concern themselves with doubts that legitimately might appear in the minds of jurors.⁵³ Most cases still exhibited the familiar formulas emphasizing "belief."⁵⁴ The requirement that the jury be "fully satisfied" or "satisfied" on the basis of the evidence continued as a common feature.⁵⁵

We do, however, notice a more secular terminology. The phrase "if you believe the evidence" was often replaced by "if you think the evidence . . ."⁵⁶ The term "judgment" or "understanding" also became more frequent. One judge advised a jury to "exercise your judgments" on the evidence.⁵⁷ The "understandings" of the jury must be "absolutely coerced to believe."⁵⁸ Another judge noted that jurors "were rational men and will determine according to your consciences, whether you believe those men guilty or not."⁵⁹ Coerced assent was, as we have seen, a

53. For the increased importance of legal counsel in criminal trials, see Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

54. Trial of de la Motte, 21 Howell St. Tr. 687, 713, 813, 814 (London 1781) (high treason); Proceedings against Jackson, 25 Howell St. Tr. 783, 876 (K.B. 1781) (high treason); Trial of Hart, 26 Howell St. Tr. 387, 414 (Dublin 1796) (high treason); Trial of Binn, 26 Howell St. Tr. 595, 652 (Warrick assizes 1797) (sedition); Trial of Maclane, 26 Howell St. Tr. 721, 811 (Quebec 1797) (high treason); Trial of Dunn, 26 Howell St. Tr. 839, 872 (Dublin 1797) (murder). Another common formula asked the "opinion" of the jury. Trial of Lord Byron, 19 Howell St. Tr. 1177, 1233 (H.L. 1765) (murder); Trial of Redhead, 25 Howell St. Tr. 1003, 1154 (York assizes 1795) (conspiracy); Trial of Finerty, 26 Howell St. Tr. 901, 1008 (Dublin 1797) (seditious libel). "Opinion" had a far lower status than "satisfied belief" in common terminology, and would have been viewed as far below "moral certainty."

55. Trial of de la Motte, 21 Howell St. Tr. 687, 814 (London 1781) (high treason); Trial of Gordon, 22 Howell St. Tr. 175, 208 (K.B. 1787) (libel); Jones v. Shipley, 21 Howell St. Tr. 847, 949-50 (K.B. 1783) (seditious libel); Trial of Weldon, 26 Howell St. Tr. 225, 280-81 (Dublin 1795) (high treason).

56. Trial of M'Daniel, 19 Howell St. Tr. 745, 845 (Old Bailey 1755) (accessory to a felony); Trial of Gordon, 21 Howell St. Tr. 485, 647 (K.B. 1781) (high treason); Proceedings against Eaton, 22 Howell St. Tr. 753, 822 (Old Bailey 1793) (libel, for publishing Thomas Paine's *The Rights of Man*); Trial of Redhead, 25 Howell St. Tr. 1003, 1154 (York assizes 1795) (conspiracy).

57. Trial of Handy, 24 Howell St. Tr. 199, 383 (Old Bailey 1794) (high treason); see also Trial of Redhead, 25 Howell St. Tr. 1003, 1154 (York assizes 1795) (conspiracy). The "judgment" would consider whether the weight of the evidence was sufficient or not. Trial of Crossfield, 26 Howell St. Tr. 1, 222 (Old Bailey 1796) (conspiracy).

58. Trial of Weldon, 26 Howell St. Tr. 225, 286 (Dublin 1795) (high treason). A guilty verdict was appropriate "if your understandings are absolutely coerced to believe." Coerced assent for Locke and others was associated with the highest degree of probability or "moral certainty."

59. Trial of Glennan, 26 Howell St. Tr. 437, 457 (Dublin 1796) (high treason). In another case the jury was advised to judge "by the result of the evidence and the clear impressions that the result shall make upon your minds." It was not to judge on mere probabilities. Trial of Tooke, 25 Howell St. Tr. 731, 743 (Old Bailey 1794) (high treason). In another they were to find the truth "according to your conscience and the best of your judgments." Trial of

characteristic of moral certainty and of Locke's highest degree of probability. As with casuists, the understanding and the conscience were concerned with the same, not different, mental processes and both involved rational deliberation. Although terms like "mind," "understanding," and "judgment" have an obviously more secular flavor than "belief" and "conscience" and were sometimes substituted for them, we must beware of making sweeping statements about secularization, for the more secular terms often appear together with the more traditional ones.

We can, in these cases, trace a growing concern for situations in which juries might have doubts about evidence and thus about their verdicts. Their minds might be "suspended in such a degree of that doubt" that they could not be "satisfied."⁶⁰ In a case of 1752 the prosecution suggested that the evidence was "so strong, so convincing, . . . that that Presumption that will rise to a Conviction; there will not remain the least Doubt of it."⁶¹

This period witnessed the first use of the "beyond reasonable doubt" standard so familiar to modern ears. Anthony Morano has suggested that the "beyond reasonable doubt" test was introduced by the prosecution and that it actually was designed to provide less protection to the accused than the "any doubt" test which did not require that doubts be reasonable.⁶² My reading of the cases and the treatise literature is somewhat different. I do not think the "any doubt" terminology had ever meant that juries should acquit on the basis of frivolous doubt. The phrase "moral certainty" was taken to mean proof beyond reasonable doubt. If one had real doubts, moral certainty was not reached. The phrase "beyond reasonable doubt" was, I believe, not a replacement of the "any doubt" test but was added as a clarification of the notion of

Leary, 26 Howell St. Tr. 295, 350 (Dublin 1795) (same). The evidence was to carry "conviction brought home to your minds." *Id.* at 351; *see also* Trial of Kennedy, 26 Howell St. Tr. 353, 386 (Dublin 1796) (same); Trial of Hart, 26 Howell St. Tr. 387, 437 (Dublin 1796) (same); Trial of Watt, 23 Howell St. Tr. 1167, 1386 (Edinburgh 1794) (same).

60. Proceedings against Jackson, 15 Howell St. Tr. 783, 876, 877 (K.B. 1795) (high treason). In another case jurors were told that if "the scale should hang doubtful" and they were not "fully satisfied," they should acquit. Trial of Gordon, 21 Howell St. Tr. 485, 647 (K.B. 1781) (high treason); *see also* Proceedings against Frost, 22 Howell St. Tr. 471, 519 (K.B. 1793) (sedition). In another, jurors were told to acquit if "there remains any doubt upon the case." Trial of Tooke, 25 Howell St. Tr. 1, 739 (Old Bailey 1794) (high treason). Judges who raised the possibility of doubt were also more likely to suggest the possibility of acquittal. Jurors were thus more likely to be reminded that the benignity of English law was in favor of life and of the legal maxim that taught that it is preferable for 10 or even 100 guilty men to go free rather than one innocent man die.

61. THE GENUINE TRIAL OF SWANN 4 (London 1752).

62. Morano, *A Reexamination of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 514-15 (1975).

moral certainty and satisfied belief. Indeed, many of the cases that enunciated the "beyond reasonable doubt" test for acquittal employed the phrases "if you believe," or "if your conscience is satisfied," or "if you are satisfied with the evidence" when stating what was required for conviction. Reasonable doubt was simply a better explanation of the satisfied conscience standard that resulted from increasing familiarity with the "moral certainty" concept.

Morano's research, however, has established that the "beyond reasonable doubt" standard was first employed in the Boston Massacre trials of 1770, rather than at the turn of the century in the Irish treason trials.⁶³ Interestingly, the Boston cases do not suggest that the standard was considered innovative, for both prosecution and bench emphasized that the accused were being tried according to traditional English usage.⁶⁴ The prosecution, appealing to the jury's "Cool and Candid Reason," indicated that if the "Evidence is not sufficient to Convince beyond reasonable Doubt," the jury must acquit. The prosecution, of course, asserted that the evidence was "sufficient to convince you of their Guilt beyond reasonable Doubt."⁶⁵ The judges, however, employed the traditional "fully satisfied" and "satisfied belief" formulations as well as "if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent."⁶⁶

We should not be surprised, however, that the introduction of the "reasonable doubt" standard appeared to be neither novel nor controversial in the Boston cases precisely because it was consistent with the notions of "belief," "satisfied conscience," and "moral certainty" employed in and out of the courtroom. In fact, Sir Geoffrey Gilbert's authoritative *The Law of Evidence*, the first major treatise devoted entirely to legal evidence, had appeared in several editions before 1770 and had used similar language.⁶⁷

Thus in 1777, in one of the rare cases tried at Old Bailey fully re-

63. See *id.* at 516-19.

64. 3 THE LEGAL PAPERS OF JOHN ADAMS 270 (L. Wroth & H. Zobel eds. 1965).

65. *Id.* at 271-73.

66. *Id.* at 292, 299-300, 309. John Adams, on another occasion, argued that each jurymen had the right and duty "to find the Verdict of the Case according to his own best Understanding, Judgment and Conscience," even though it might be in direct opposition to the direction of the court. 1 *id.* at 230.

67. G. GILBERT, *THE LAW OF EVIDENCE* (Dublin 1754). It would not, therefore, be unreasonable to expect "beyond reasonable doubt" language any time after 1754, the year Gilbert's treatise first appeared. Indeed, given the scanty published records of trials for the eighteenth century, it may well have been employed but no evidence of it remains, although we must note that it does not appear in the published *State Trials* before 1795, nor is it found in the legal writing of Coke, Hale, or Blackstone.

corded in shorthand, Counsel Mansfield told the jury, "If the evidence be such as 'irresistably prove' [the crime], . . . if you see any room upon the evidence to doubt of his being guilty, if you are not perfectly convinced you must find the accused not guilty."⁶⁸ The reasonable doubt formulation also appeared in a 1796 Canadian case. The jury was informed that, if they had any reasonable doubt, they must acquit "for it is the invariable direction of our English Court of Justice" to lean on the side of mercy.⁶⁹

We must look, if only briefly, at the language of the turn of the century Irish trials, many of which employed the reasonable doubt standard in conjunction with the notion of satisfied conscience and belief. In the 1795 *Trial of Weedon*, one judge indicated a guilty verdict was appropriate "if it should appear beyond all doubt that these acts in question were done by the prisoner." Unless they were "perfectly satisfied" the jury had to acquit.⁷⁰ Another judge told the jury a guilty verdict should be forthcoming "if your understandings are absolutely coerced to believe" the testimony of the witness.⁷¹ Coerced assent was, as we have seen, equivalent to moral certainty and to Locke's highest degree of probability. If, however, the jury had "any rational doubt" in their "minds," they must acquit.⁷² A third judge combined the notions of conscience, belief, and rational doubt. The jury was "to determine upon the weight of . . . [their] observations, to consider the facts and circumstances" and decide if they "believe [the evidence] to be true." If, however, they felt "such a doubt as reasonable men may entertain," they were bound to acquit.⁷³ The fact that several judges employed the same language alone should indicate that the terminology had gained widespread acceptance.

The same mixture appears in the 1795 *Trial of Leary*. If the evidence carried "conviction brought home to [the jurors'] minds, such a conviction as leaves no doubt that the prisoner is . . . guilty," they had to declare him so. "But if . . . [they] should have any doubt, such as reasonable men may entertain," acquittal was appropriate.⁷⁴ In the 1796 *Trial*

68. WHOLE PROCEEDINGS OF OLD BAILEY 110-11 (London 1777).

69. Trial of Maclane, 26 Howell St. Tr. 721, 811 (Quebec 1797) (high treason). They were also instructed to convict if they believed the evidence.

70. Trial of Weldon, 26 Howell St. Tr. 225, 280-281 (Dublin 1795) (high treason).

71. *Id.* at 286.

72. *Id.*

73. *Id.* at 289.

74. Trial of Leary, 26 Howell St. Tr. 295, 351 (Dublin 1795) (high treason). Jurors in the same case were also told that they should decide "according to your conscience, and the best of your judgments." *Id.* at 349-50; Trial of Kennedy, 26 Howell St. Tr. 353, 385-87 (Dublin 1796) (same). In another 1796 case the judge informed the jury, "if you believe that from any ra-

of *Kennedy*, the jury was told, "if you have no doubt, such as a rational man may entertain," a guilty verdict was called for. But if they should "entertain such a reasonable doubt," they must acquit.⁷⁵ Jurors were expected to conform to the model of the rational man.

In the 1796 *Trial of Glennan*, the judge instructed the jury, "if you have a reasonable doubt, not such as idle or fanciful men may take upon remote probabilities, but such as cannot satisfy your judgments upon your oaths," they should acquit. "You are rational men, and you will determine according to your consciences, whether you believe these men guilty or not."⁷⁶ Here the language of belief, the satisfied conscience, and "beyond reasonable doubt" are all linked together.

The "beyond reasonable doubt" standard was prominent in all the turn of the century Irish treason trials. Yet nothing indicates that a new standard was self-consciously enunciated. The new formula usually appeared with statements that conviction rests on a satisfied conscience or belief in the testimony of the witnesses. Most typically it was introduced when judges added instructions about acquittal. I am not suggesting here that juries had become more concerned with high levels of proof, for they seemed to have expected it, but rather that the judiciary, in its

tional consideration," a particular witness was not entitled to credit, they must acquit. If they were "in suspense" or "suspended in doubt" they should also acquit. Trial of Hart, 26 Howell St. Tr. 387, 414, 419 (Dublin 1796) (same). In the 1797 *Trial of Sheares*, the judge indicated that if the jury "entertain any rational doubt, not merely a capricious doubt, but the doubt of sensible men," then they should acquit. Trial of Sheares, 27 Howell St. Tr. 255, 391 (Dublin 1798) (same). In a 1798 case jurors were advised that if they "entertain a fair and conscientious doubt" as to the credit of the witnesses or to "the sufficiency of the evidence," they should acquit. Trial of MacCann, 27 Howell St. Tr. 399, 453-54 (Dublin 1798) (same).

In still another 1798 Irish case, defense counsel indicated that if the jury's conscience were satisfied on the evidence they should convict, but if they had a rational doubt they should acquit. The judge noted that, if they were "not satisfied with the weight of the evidence, or entertain[ed] such doubts upon the cases, as rational and conscientious minds may well indulge in," they should acquit. If "satisfied" in their "consciences" that the evidence were true, they must find the accused guilty. Trial of Byrne, 27 Howell St. Tr. 455, 494, 523 (Dublin 1798) (high treason); see also Trial of Tuite, 27 Howell St. Tr. 1127, 1135 (Dublin 1799) (same); Trial of Bond, 27 Howell St. Tr. 523, 611 (Dublin 1798) (same).

In 1803 Lord Nocking explained they were to acquit if they had a "rational and well grounded doubt." Trial of Donnelly, 28 Howell St. Tr. 1069, 1097 (Dublin 1803) (high treason).

75. Trial of Kennedy, 26 Howell St. Tr. 353, 386-87 (Dublin 1796) (high treason).

76. Trial of Glennan, 26 Howell St. Tr. 437, 457 (Dublin 1796) (conspiracy); see also Trial of the Bishop of Bangor, 26 Howell St. Tr. 463, 527 (Shrewsbury assizes 1796) (riot). The beyond reasonable doubt standard also appeared in the Trial of Finerty, 26 Howell St. Tr. 901, 1008 (K.B. 1797) (seditious libel). In the *Trial of Finney* the judge indicated that the evidence must be "full and complete in your minds, and such as ought to satisfy your conscience." They were to be "satisfied beyond all possibility of doubt, that the testimony which you have heard is true." Trial of Finney, 26 Howell St. Tr. 1019, 1132 (Dublin 1798) (high treason).

charges to the jury, was articulating those high standards in language consistent with and influenced by the terminology of the established philosophical community.

The "beyond reasonable doubt" standard also appeared in a number of American trials about the turn of the century. The 1798 *Trial of Matthew Lyon* for seditious libel in the Circuit Court for the Vermont District indicates that the standard was being applied early in the history of the new nation. The judge informed the jury, "you must be satisfied beyond all reasonable substantial doubt that the hypothesis of innocence is unsustainable."⁷⁷

Defense counsel in the *Trial of the Northampton Insurgents* before the U.S. Circuit Court, 1799-1800, advised the jury to "remember that it is enough for us in defence of the prisoner to raise a doubt; for, if you doubt (it is the principle of law, as well as of humanity) you must acquit."⁷⁸ A second defense counsel indicated that the presumption of innocence must be maintained "until the contrary is proved by the most incontrovertible evidence."⁷⁹ The offense must be "proved in such a manner as to leave no possibility of doubt on the minds of the jury."⁸⁰ Proof must "come from the purest sources, and be of that nature as to establish the crime beyond the possibility of a doubt." The jury was also reminded of the necessity of divesting themselves of "opinion or bias, . . . otherwise there is not a fair scope for our reasonable faculties to act, nor can our consciences be acquitted of guilt."⁸¹ The prosecution in the case indicated the testimony offered had been "produced . . . to remove every doubt" from the jury's "minds."⁸² The judge, like the prosecutor, invoked the "beyond reasonable doubt" standard.⁸³

The "beyond reasonable doubt" standard, however, was not uniformly applied until well into the 1800s, when it was defined as follows:

It is not merely possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or

77. *Trial of Lyon* (D. Vt. 1799) (seditious libel), reprinted in F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 333, 336 (1849).

78. *Trial of the Northampton Insurgents* (D. Pa. 1799-1800) (open rebellion), reprinted in F. WHARTON, *supra* note 77, at 458, 548.

79. *Id.* at 553.

80. *Id.* at 554.

81. *Id.*

82. *Id.* at 578.

83. *Id.* at 586. In the *Trials of Richard Smith*, defense counsel reminded the jury "if there remain a single doubt, it is your duty to have that doubt completely removed, before you convict, . . ." *TRIALS OF RICHARD SMITH* 206 (1816). The judge charged the jury to decide "according to the law and to the evidence." *Id.* at 227.

imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgement This we take to be proof beyond a reasonable doubt⁸⁴

By mid-century, and probably as early as 1800, the "satisfied conscience" and "beyond reasonable doubt" standard had become explicitly linked. The addition of the concept of moral certainty reflected the desire to make legal language consistent with the philosophical terminology of the day. This terminology, however foreign to modern ears, was part of the language and discourse of the educated classes in both England and America. "Satisfied conscience," "reasonable doubt," and "moral certainty" were widely used concepts, and these and related terms were to be found in moral, theological, historical, and philosophical as well as legal discourse.

III

The legal treatise on evidence was a new genre that emerged in the early eighteenth century. These treatises suggest, even more than the cases, that the evolution of the doctrine of proof beyond reasonable doubt was linked to the changing philosophical scene. One of the most interesting features of the treatises on evidence, and the more general discussions of law, is that so many authors found it necessary to place their treatments of legal evidence in the context of current epistemological thought. It seemed to them essential to ground the rules of evidence, which were the bulk of the treatises, on what was considered to be a sound theory of knowledge. Legal rules, they evidently felt, could not stand alone. Nor were they to be justified by tradition or by a special sort of legal reasoning. The treatise writers attempted to demonstrate that the rules of evidence, some of them centuries old, could and did rest on sound notions of what constituted appropriate evidence and good proofs, that is, on an intellectually satisfying theory of human knowledge. The rules, then, though not directly derived from philosophical principles, had to be seen as conforming to the sound epistemological and logical principles developed by contemporary philosophy.

Several major Anglo-American writers attempted to integrate legal evidence with the then-reigning empirical English philosophies. The two

84. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 320 (1850). This definition was widely adopted. Morano, *supra* note 62, at 523 n.23

earliest writers, Sir Geoffrey Gilbert and John Morgan, relied on Locke to provide the foundation for their treatises. James Wilson and David Hoffman, who prepared more general lectures, leaned heavily on the Scottish "common sense" philosophers of the eighteenth century, and Thomas Starkie on a philosophical miscellany. Thus, if the earliest treatises are liberally sprinkled with Locke, the later ones include generous dashes of Hartley, Watt, Reid, Bentham, Paley, Stewart, and others.

The first real treatise on evidence, *The Law of Evidence*,⁸⁵ was written before 1726 by Sir Geoffrey Gilbert, a respected judge and legal scholar, knowledgeable in the mathematical and scientific work of the day. He was also the author of an abstract of John Locke's *Essay on Human Understanding*. Not surprisingly, his posthumously published treatise begins with a summary of Lockean principles:

There are several degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeness . . . and there are several Acts of the Mind proportioned to these Degrees of Evidence . . . from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust and Disbelief. Now what is to be done in all Trials of Right, is to range all Matters in the Scale of Probability, so as to lay most Weight where the Cause ought to preponderate, and thereby to make the most exact Discernment that can be, in Relation to the Right.⁸⁶

The law did not have access to certain knowledge because litigation depended on transient events "retrieved by Memory and Recollection." The "Rights of Men" were therefore "determined by Probability," not demonstration.⁸⁷ Assessment of probability, however, required careful

85. G. GILBERT, *supra* note 67. Editions appeared in 1756, 1760, 1761, 1769, 1777, 1791-94, 1795-97, 1801. His treatise was composed before 1726, the year of his death.

86. *Id.* at 1-2.

87. *Id.* at 3. Gilbert discussed both certainty and probability. Certainty is obtained by a "clear and distinct perception" of the senses and a "way of knowledge by necessary Inferences." *Id.* at 1-2; see also G. GILBERT, ABSTRACT OF MR. LOCKE'S ESSAY 42, 45-47 (1752).

As we judge by our Experience, so also we judge by the Sight, Observation, and Experience of others; and this is called Testimony. And in this light things are considerable: 1) The Number. 2) The Integrity. 3) The Skill of the Witnesses. 4) Their True Design and Interests. 5) The Consistency of the Parts and Circumstances of the Relation. 6) Contrary Testimonies. 7) The Consistence of what is attested with our own Observation and Experience. And 8) The Distance of such relators from the Sight and View of the Thing which they attest; which is so far weakened as they themselves take it from others, and the Thing related doth not fall under their own View or Experience. These are the Criteria of Probability, though Facts depending on mere human Agents

Id. at 48-49. For an important treatment of the history of evidence, see W. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985). Twining views Anglo-American evidence scholarship from Gilbert on to be rooted in English empiricism, that is, in Locke, Bentham, J. S. Mill, Sidgwick, and modern analytical philosophers such as A.J. Ayers. See *id.* at 1-18.

consideration of the degrees of credibility of the witnesses. There was no more reason to doubt the statements of credible witnesses than if "we ourselves had heard and seen" what the witnesses reported.⁸⁸ Verdicts would necessarily be devoid of absolute certainty or demonstration, but trials, at least those with appropriately credible witnesses, might proceed to verdicts which the jury had no reason to doubt.

John Morgan's 1789 *Essay Upon the Law of Evidence* similarly relied on a Lockean conception of knowledge.⁸⁹ He too indicated that there are degrees of knowledge ranging from perfect certainty and demonstration on the one hand to improbability and unlikeliness on the other, and that there are acts of the mind proportioned to the evidence. These ranged from "full assurance and confidence, to conjecture, doubt and disbelief." Although legal proceedings "must judge on probability," nothing less than the "highest degree of probability must govern" the courts.⁹⁰ When one had reached a judgement based on "the honesty and integrity of credible and disinterested witnesses" the mind had no choice but to "acquiesce therein as if a knowledge by demonstration." The mind "ought not any longer to doubt but, to be nearly if not as perfectly well-satisfied as if we of ourselves knew the fact."⁹¹

Morgan's "satisfaction" was also synonymous with judicial demands for jury "satisfaction" or "satisfied conscience." Jury verdicts must be based on the very highest knowledge available to man in matters of fact. Morgan, like Gilbert, hoped to ground the law of evidence on a sound epistemological foundation.

James Wilson, Professor of Law at the College of Philadelphia and Associate Justice of the United States Supreme Court, insisted in 1790 that the law was and must be "conformable to the true theory of the human mind."⁹² Wilson's treatment centered on the concept of "belief,"

88. G. GILBERT, *supra* note 67, at 4. The 1795 revision contains references not only to Locke but also to John Wilkins, Richard Price, David Hartley, and Isaac Watts. See Waldman, *supra* note 9, at 312-13.

89. J. MORGAN, *ESSAYS UPON THE LAW OF EVIDENCE* (London 1789). He also referred to Paley on evidence. 1 *id.* at 1.

90. *Id.* at 2-3. Witness credibility and circumstantial evidence governed judgment in legal trials. *Id.* at 39, 48-49. The credibility of a witness was to be judged from his "state and dignity in the world," his religiosity, moral condition, interest in the cause, intelligence, and memory. *Id.* at 46. The quality, education, behavior, and understanding of a witness must also be taken into account. *Id.* at 12-13; see also *id.* at 47, 146-255.

91. *Id.* at 3, 4-5. Morgan also discussed concurrent testimony, circumstantial evidence, the doctrine of presumptions, and how to evaluate the credibility of witnesses. Morgan, like most later writers on evidence, devoted a good deal of time and space to a proper understanding of presumptions and circumstantial evidence.

92. 1 *THE WORKS OF JAMES WILSON* 505 (J. Andrews ed. 1896) [hereinafter J. WILSON].

whose most salient characteristic within and without the legal context was that it admitted "of all possible degrees from absolute certitude down to doubt and suspicion."⁹³ Wilson, however, was quite critical of some aspects of Cartesian and Lockean conceptions of knowledge and relied instead on the formulations of Thomas Reid and the Scottish "common sense school," which would dominate Anglo-American epistemological discussion and moral philosophy in the late eighteenth and early nineteenth centuries.⁹⁴

Wilson, like most of his predecessors of the late seventeenth and early eighteenth century, identified two varieties of reasoning, the demonstrative and the moral. The former yielded abstract and necessary truths or the unchangeable relations of ideas. The latter dealt with "real but contingent truths and connections which take place among things actually existing."⁹⁵ Although Wilson rejected some of the Lockean terminology which he found in Gilbert and Blackstone, he noted that moral evidence arose by "insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty."⁹⁶

Testimony was, for Wilson, the most important of some fourteen sources of moral evidence. It not only provided the "greatest part" of the jury's business but most knowledge of "men and things."⁹⁷ Testimony not only provided the basis for "many parts of jurisprudence," but for history, criticism, and "for all that acquaintance with nature and the works of nature, . . . founded on personal observation and experience."⁹⁸ "The whole stupendous fabric of natural philosophy" thus had the same epistemological basis as the law.⁹⁹

Wilson also enumerated and discussed the reasons for doubting or rejecting testimony: that the thing or event appeared improbable, that testimony might be given by those incompetent to judge the matter, by someone who previously gave false testimony, or with a temptation to deceive. Other elements which entered into the jury's evaluation were the reputation of the witness and the manner in which testimony was delivered. All these considered jointly would render the force of the testimony believable or not. The concurrent testimony of many witnesses deprived of the opportunity for collusion thus would be "equal to that of

93. *Id.* at 481.

94. Wilson had been educated in Scotland. See S. GRAVE, *THE SCOTTISH PHILOSOPHY OF COMMON SENSE* 88-92 (1960).

95. J. WILSON, *supra* note 92, at 518.

96. *Id.* at 519; see also *id.* at 508-09.

97. *Id.* at 505.

98. *Id.* at 504-05.

99. *Id.* at 509.

strict demonstration."¹⁰⁰ Testimony and concurrent circumstances might allow juries to gain a sense of moral certainty about facts and events. The jury's belief thus required a considered "act of the mind." In capital cases, Wilson thus insisted, the evidence must be so strong as to "force belief."¹⁰¹

Thus by the late eighteenth century the concepts of moral certainty and proof beyond reasonable doubt were tightly linked together in the philosophical literature, in the legal treatises, and in discussions of law designed to reach the educated public. The language of these concepts along with philosophically oriented statements concerning the nature of human knowledge were also becoming commonplace in the early nineteenth century evidence treatises, although not every text included both of these elements.

A brief review of some of the most influential treatises will suggest the linkage. If Leonard McNally's *The Rules of Evidence on Pleas of the Crown*¹⁰² offers little in the way of philosophical underpinnings, McNally nevertheless played a crucial role in enunciating and publicizing the "beyond reasonable doubt" standard—both in his role as defense counsel in several of the turn of the century Irish treason trials and in his treatise on evidence. McNally insisted that it was a rule of law that if a jury "entertain a reasonable doubt" as to the truth of the testimony of the witnesses, it must acquit. Reasonable doubt arose from testimony which the jury judged not to "deserve credit." Such doubt might arise from the "infamy" of the witness' character, interest, and his manner of giving evidence. Showing resentment or partiality, for example, might "impress suspicion" of prevarication. If the witness' credibility was questionable "unless his testimony be supported by clear and collateral proof . . . doubt must arise in the minds of the jurors."¹⁰³ It was the "indispensable duty" of the judges in charging the jury to ask "whether they are satisfied, beyond the probability of doubt, that [the defendant] is guilty."¹⁰⁴

In *The Philosophy of Evidence*, Daniel McKinnon, like Gilbert, Morgan, and Wilson, began with a brief discussion of certainty,

100. *Id.* at 503-04.

101. 2 *id.* at 232. Wilson raised the issue of the jurors' doubt while considering the problem of unanimous verdicts. If a "single doubt" remained in the mind of any juror, it must produce the dissent of that particular juror. If that dissent was believed, all other jurors should agree to an acquittal. *Id.* at 235. Wilson may have been the first to discuss the problem of producing unanimous verdicts in the context of evidentiary concerns.

102. L. McNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* (London & Dublin 1802).

103. *Id.* at 3.

104. *Id.* This rule, he noted, was fully accepted in the 1798 Dublin cases by both the court and the prosecution.

probability, and assent, and referred to the current epistemological theorists of the day—Locke, Reid, and Stewart.¹⁰⁵ He thus made the by then commonplace distinction between intuitive or demonstrative knowledge and probable knowledge, under which he included presumption of indirect as well as direct proofs. If demonstrative knowledge “exclude[s] all possible doubt,” probable and presumptive knowledge does not. Degrees of certitude thus varied. For this reason rules were needed “to restrain the latitude of individual opinion . . . and [to] conduct the investigations of truth by a strict and methodical course of argument.” The law of evidence was “framed with this intention.”¹⁰⁶ Although McKinnon did not use the language of moral certainty, he indicated that juries were to acquit if the evidence “is at all doubtful,” and further indicated that this “very humane rule” was “fortified by the presumption that every man is innocent till his guilt appears.”¹⁰⁷

While Phillips’ *Theory of Presumptive Proof* did not use the phrase “beyond reasonable doubt,” it did indicate that the “impression in the mind of a jury in a criminal case” must not be “that the prisoner is probably guilty, but that he really and absolutely is so.” If the jury had doubts, they were to acquit.¹⁰⁸

In the late eighteenth and nineteenth centuries it was not unusual for discussions of legal evidence to include or refer to treatises on logic, or for general discussions of logic and modes of proof to devote considerable attention to matters relevant to the law. Since most Anglo-American philosophy and epistemology was empirical in its orientation, a great deal of attention was quite naturally devoted to questions relating to the probability and certainty of arguments and evidence which related to matters of fact.

While it is obviously not possible here to undertake a detailed discussion of the relationship between concepts of legal evidence and the writings of moral philosophers, natural philosophers, and logicians, brief comments on a few such writers should indicate the overlap between members of the legal profession considering legal evidence and the writing on evidence in other areas. We have already noted the early dependence on Locke. The next generation of writers relied more heavily on David Hartley, Thomas Reid, and Isaac Watts, and still later ones on

105. D. MCKINNON, *THE PHILOSOPHY OF EVIDENCE* 20, 24, 25 (London 1812).

106. *Id.* at 25, 27. Common sense “must be the sole guide” for determining the jury’s belief. *Id.* at 53. McKinnon’s discussion of presumption employed a slightly Anglicized version of the categories of the Civilians. *Id.* at 56.

107. *Id.* at 27, 64.

108. S. PHILLIPS, *THEORY OF PRESUMPTIVE PROOF* 58 (London 1814), quoted in May, *Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 642-64, 658 (1876).

James MacIntosh, Richard Kirwan and Dugald Stewart, and John Stuart Mill.

David Hartley's 1749 *Observations on Man* was frequently cited by legal writers on issues of evidence and the nature of human knowledge. Topics of relevance to legal writers might include the nature of assent and dissent, the role of rational assent in mathematical and practical reasoning, and the differences between true, doubtful, and fictitious narrations of fact.¹⁰⁹ Hartley noted that some facts were "practically certain" while others were "liable to doubts."¹¹⁰

Isaac Watts' 1724 *Logick*, another frequently cited source, defined logic as the "art of using Reason in our Inquiries after Truth," a concept which he believed referred equally to the actions of life as to the natural sciences. Perhaps of most interest to lawyers was his discussion of the principles and rules of judgment in matters of human testimony.¹¹¹ In this connection, he indicated, one must ask whether the event in question was possible, whether there were concurrent circumstances in addition to testimony, and whether the character and knowledge of the testifier made his testimony believable. If one theme dominated Watts' discussion of evidence, it was the need to exactly proportion assent to the degree of evidence. Where the evidence was insufficient, the mind was to suspend assent.¹¹² Most of the rules and principles were easily applicable to the courtroom and it is not surprising that writers on legal evidence found his discussions useful.

George Campbell's *Philosophy of Rhetoric* also discussed evidence in ways relevant to legal writers. Campbell largely limited his discussion to "moral evidence" because the sphere of demonstrable evidence was so small. He thus devoted a good deal of attention to experience and testimony. The latter, he insisted, was capable of providing certainty. Indeed, one must give an unlimited assent "when we have no positive reason of mistrust or doubt."¹¹³ Many beliefs are based on moral evidence which does not create doubts. All decisions of fact involve moral evidence and these in turn involve degrees of certainty which range from possible to probable, "to the summit of moral certainty."¹¹⁴ Campbell

109. D. HARTLEY, *OBSERVATIONS ON MAN* 204-30 (London 1749).

110. *Id.* at 362.

111. I. WATTS, *LOGICK, OR THE RIGHT USE OF REASON IN THE INQUIRY AFTER TRUTH* 266-71 (London 1775) (1st ed. London 1724).

112. *Id.* at 175, 177, 247.

113. G. CAMPBELL, *THE PHILOSOPHY OF RHETORIC* 55 (L. Bitzer ed. 1963) (1st ed. London 1776); see also *id.* at 43, *passim*. This work was composed about 1750 and published in 1776. It was frequently reprinted until 1911.

114. *Id.* at 44.

not only employed the language of reasonable doubt and moral certainty, but allied this language and other issues relating to assent to philology and history, as well as to law. Certainly by the end of the eighteenth century the concepts of moral certainty and proof beyond reasonable doubt were widely circulated in the moral and philosophical literature. Their introduction in legal writing and in the jury charges which emerged late in the century should thus not be surprising.

The same development continued in the nineteenth century. Richard Kirwan's 1807 *Logick*, a general treatment of the logic of proof, insisted that the rules of evidence and the logic on which they are based must be "diligently attended to" in countries where "all men are liable to set on juries."¹¹⁵ Kirwan, in the manner of seventeenth and eighteenth century natural theologians, discriminated between metaphysical, physical, and moral certainty, as well as between demonstrative and other proofs.¹¹⁶ He not only discussed the bases for confident belief, "suspicion, doubt, or hesitation,"¹¹⁷ but devoted chapters to "indubitable proofs productive of certainty," "ambiguous or suspicious proofs," "fallacious proofs," and "probable proofs." He also gave considerable attention to direct and indirect proofs, the credibility of testimony, and presumptions. References to law, legal writers, and legal situations were thus not at all unusual in Kirwan's *Logick*.¹¹⁸ Indeed, Kirwan appears to have considered lawyers and prospective jurors as his primary audiences. It is thus not at all surprising that David Hoffman should recommend Kirwan's *Logick* to students of law or that other writers on legal evidence should recommend logical and epistemologically oriented treatises such as those of Locke, Hartley, Reid, Abercrombie, Kirwan, and others. The list of recommended philosophical works, as one might expect, was modified over time and later writers favored Kirwan, Whately, and John Stuart Mill over earlier works.

An example of this mutual borrowing or mutual reinforcement is found in James Gambier's *A Guide to the Study of Moral Evidence*. The editor of this work, which deals with evidence in a wide variety of types of human knowledge, particularly emphasized the importance of such a work for jurors. He insisted that it is they and not counsel alone who "ought to be familiar with the rules of evidence."¹¹⁹ Indeed, he com-

115. 1 R. KIRWAN, *LOGICK; OR AN ESSAY IN THE ELEMENTS, PRINCIPLES, AND DIFFERENT MODES OF REASONING* at i, x (London 1807).

116. *Id.* at 151.

117. *Id.* at 146; see also *id.* at 151, 224.

118. See, e.g., 2 *id.* at 354, 555.

119. J. GAMBIER, *A GUIDE TO THE STUDY OF MORAL EVIDENCE: OR OF THAT SPECIES OF REASONING WHICH RELATES TO MATTERS OF FACT AND PRACTICE* 49 (1834).

plained what a small portion of potential jurors "have ever received one hour's direct instruction on the Science of Evidence." He recommended that "Every child who may hereafter stand in a jury-box to decide on a question of fact 'according to the evidence' ought to be instructed in the laws of evidence; so that he may *know for himself* when a fact is proven, and some of its details, to be imported even in the common school."¹²⁰ It was with that thought in mind that he introduced Gambier's treatise to the public.

Gambier defined moral evidence as that "species of proof, which is employed on subjects, directly or indirectly, connected with moral conduct." It was not, however, limited to those subjects, but was "extended to all those facts, and events, concerning which we do not obtain the evidence of sense, intuition, or demonstration, and to all the general truths, which are deduced from observation."¹²¹ Indeed, it dealt with all matters of fact.¹²² Moral evidence was to be distinguished from demonstration which led to absolute certainty, for the proofs involved in moral evidence were fallible. They therefore could not produce absolute certainty but only "probable judgment, or at most moral certainty."¹²³ Probability, however, might "rise so high, as to exclude all reasonable doubt."¹²⁴ Moral evidence involved degrees of assent ranging "from suspicion to moral certainty."¹²⁵ The degree of assent depended on the degree of evidence. "Thus when the evidence on one side preponderates a very little, there is ground for suspicion, or conjecture. Presumption, persuasion, belief, conclusion, conviction, moral certainty, doubt, wavering, distrust, disbelief, are words which imply an increase or decrease of this preponderancy."¹²⁶ Lawyers and divines thus have their proofs, and

though they do not amount to demonstration, yet, if they be sufficient to exclude all reasonable doubt, they ought to be admitted to be proofs. In truth, wherever there is produced, in favour of any proposition, the highest kind of evidence of which it admits, and in a sufficient degree to outweigh all that can be urged against it, it may properly be said to be proved.¹²⁷

Since the judgment required training in "estimating the relative worth of different kinds of evidence,"¹²⁸ the book was designed to describe the

120. *Id.* at 49, 50 (emphasis in original).

121. *Id.* at 55.

122. *Id.* at 17.

123. *Id.* at 57.

124. *Id.* at 57-58.

125. *Id.* at 58.

126. *Id.* at 59. For further discussion of moral evidence, see *id.* at 59-66.

127. *Id.* at 66.

128. *Id.* at 17.

proper sort of reasoning about moral evidence.¹²⁹

Although Gambier's *Guide* is not a legal treatise, its assumptions about the nature of knowledge and the way one should reach judgments in matters of fact were relevant to the legal community. The overlap between the legal and nonlegal works is often so great that it is difficult to know which should be labeled "legal" and which should not. What is clear, however, is that the growing treatise literature played a part in the wider intellectual currents and shared rather widely held views on the nature of evidence and proof. The language of probability, certainty, moral certainty, and belief beyond reasonable doubt was part of the discourse of the educated classes. The works I have cited were designed for the literate reader, not for the professional philosopher.

Similar attention to legally relevant epistemological issues was provided by John Abercrombie, whose *Issues Concerning the Intellectual Powers and the Investigation of Truth*¹³⁰ was not infrequently cited in the evidence treatises. Not only did Abercrombie discuss probability, certainty, and the sources of certainty, but he also showed interest in the role of testimony and doubts regarding testimony. He not only employed the notion of high moral probability, but spelled out the grounds on which one can receive testimony with confidence. If his readers accepted his view that the "exercise of reason is precisely the same, and is guided by the same laws, whether it be applied to the investigation of truth or to the regulation of conduct," they must have found the interaction between the evidence treatises and the more philosophically oriented treatments of the nature of human knowledge both reasonable and normal.¹³¹

James Glassford's *Essays on the Principles of Evidence and Their Applications to the Subject of Judicial Inquiry*¹³² again suggests the overlap between the philosophical and legal writing of the early nineteenth century. Glassford's lengthy treatise was initially designed as an article for the Supplement to the *Encyclopedia Britannica* and was only published as a free-standing work because it had become so lengthy. It was thus "not intended altogether as a professional book."¹³³ Glassford indi-

129. The book treats the different kinds of moral evidence, e.g., observation, testimony, and mixed. Testimony is direct or incidental, spoken and written. The credibility of testimony is also discussed. Report, tradition, analogy, and the differences between presumption and proof are analyzed. The book also provides directions relating to moral reasoning.

130. J. ABERCROMBIE, *ISSUES CONCERNING THE INTELLECTUAL POWERS AND THE INVESTIGATION OF TRUTH* (Edinburgh 1820).

131. *Id.* at 17-19, 79, 82-84, 89-93.

132. J. GLASSFORD, *ESSAYS ON THE PRINCIPLES OF EVIDENCE AND THEIR APPLICATIONS TO THE SUBJECT OF JUDICIAL INQUIRY* (Edinburgh & London 1820).

133. *Id.* at ii-iii.

cated that evidence might be treated generally as a part of logic or as a part of particular sciences, and especially as a part of law¹³⁴—a view that would probably have seemed commonplace to nineteenth century readers. Glassford therefore divided his treatise into two parts. The first dealt with "The Nature and Sources of Evidence in General," the second with "The Several Kinds of Legal Evidence, or the Evidence Receivable in the Courts of Law."¹³⁵ As one might expect, Glassford, whose theory of evidence and proof was largely based on the then dominant Scottish "common sense school" of philosophy,¹³⁶ dealt with the whole range of evidentiary issues and concepts including probability, certainty, gradations of certainty, moral certainty, testimony, and mental conviction beyond reasonable doubt. His work does not appear to have had any great impact on the legal profession, perhaps because it attempted to draw on both English and Scottish law, but like the works of Gambier and others, it indicates the close relationship between legal and philosophical discussions of evidence and truth determination.

Thomas Starkie's immensely influential *Practical Treatise on the Law of Evidence* reflects the epistemological traditions we have been describing.¹³⁷ Indeed the treatise is liberally sprinkled with references to epistemological issues. Juries, Starkie insisted, must rely on the "general principles of belief on which any individual would act who was desirous of satisfying himself by inquiry as to the truth of any particular fact."¹³⁸ Legal facts were no different from others, although the law sometimes added special requirements such as excluding certain kinds of testimony to insure that the search for truth would in no way be contaminated.

Starkie too distinguished between absolute certainty and the moral certainty available in matters of fact:

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact.¹³⁹

The test was "the sufficiency of the evidence to satisfy the understanding

134. *Id.* at 8.

135. *Id.* at vii-viii.

136. W. TWINING, *supra* note 87, at 3.

137. T. STARKIE, *PRACTICAL TREATISE ON THE LAW OF EVIDENCE* (2d ed. London 1833) (1st ed. London 1824).

138. *Id.* at 14-15.

139. *Id.* at 478.

and conscience of the jury,"¹⁴⁰ and it was sufficient when "they produce moral certainty to the exclusion of every reasonable doubt."¹⁴¹ "[T]o acquit upon light, trivial or fanciful suppositions, and remote conjecture, is a virtual violation of the juror's oath On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused" ¹⁴² Moral certainty was equivalent to the highest degree of probability and both were indissolubly linked with the "beyond reasonable doubt" standard. "Satisfied belief" and "satisfied conscience and understanding" gradually emerged as the familiar "beyond reasonable doubt." With Starkie, the modern standard was in place. The impact of his treatise was wide and deep and influenced Anglo-American writers for many decades.

Thus, the influential early nineteenth-century American legal writer, David Hoffman, also insisted that the science of evidence must be founded on the closest observation of man's moral and intellectual nature.¹⁴³ Although Hoffman especially admired the recent treatises of Phillips and Starkie, he still felt that the English law of evidence tended to have "too little" recourse to the general principles of human action and was impaired by "too strict adherence to the analogies of the common law." He also criticized English writers for their "almost total neglect" of continental jurists such as Farinacius, Menochius, and Domat. Hoffman recommended that the philosophical and logical works of Kirwan, De Moivre, Paley, Reid, Stewart, and of course Locke be considered more seriously.¹⁴⁴ He further noted that "the effect to be allowed to intrinsic evidence of that deduced from a combination of circumstances," had been "but little explored by the legal philosophers of any country."¹⁴⁵ This great work, if ever performed, could only be accomplished by "some preeminent genius."¹⁴⁶

As one might expect, the legal writings of Jeremy Bentham have

140. *Id.* at 514.

141. *Id.* Both direct and circumstantial evidence were capable of "producing the highest degree of moral certainty." *Id.*

142. *Id.*

143. D. HOFFMAN, A LECTURE ON LAW 17 (Baltimore 1826).

144. *Id.* at 17-18.

145. *Id.* at 19.

146. *Id.* D. HOFFMAN, A COURSE OF LEGAL STUDY (Baltimore 1817) was widely read and respected. His recommendations for reading included Locke's *Essay*, Paley's *Moral and Political Philosophy*, Reid's *Essays on the Power of the Human Mind*, Pufendorf's *Law of Nature and Nations*, and McNally's *Rules of Evidence*. *Id.* at 35-37. Bentham's early writings were also discussed. Hoffman was also interested in the work of continental jurists and recommended that American law students study the civil law. *Id.* at 235, 251-69. He particularly recommended Domat on proofs and presumptions, and the evidentiary works of Everhardus, Machardus, Menochius, and Farinacius. *Id.* at 269. The influence of these works, and partic-

attracted more scholarly attention than those of most early treatise writers and commentators we have mentioned. While it is not possible to discuss his enormously long and complex *Rationale of Judicial Evidence*,¹⁴⁷ we must recall that Bentham's intention was to bring the law of evidence into conformity with the rules of logic. Bentham's powerful work exerted relatively little direct impact on the legal profession, in part because of its intense criticism of the profession and in part because of his radical desire to eliminate all formal rules of evidence. Nevertheless, the work is important for our purposes because it too bears witness to the powerful eighteenth- and nineteenth-century effort to ground the law of evidence on principles of sound reasoning. As we have noted earlier, Locke, Hartley, Reid, Paley, Abercrombie, Stewart, and others provided the basis, or at least the epistemological starting point, for many writers who concerned themselves with the problems of legal evidence. Bentham is no exception.¹⁴⁸ As one might anticipate, lengthy portions of his massive treatise explore notions of probability, improbability, and impossibility as well as the nature of testimony and circumstantial evidence, the hindrances to truthful testimony, and degrees of persuasion.¹⁴⁹

As the nineteenth century progressed, the number of legal treatises increased in all fields. These included not only general treatises on evidence but specialized works dealing with circumstantial and presumptive evidence, the latter in particular exhibiting considerable interest in epistemology and a receptiveness to civil-law writers such as Domat and Pothier.¹⁵⁰ Many of these works, too, employed the language of

ularly that of Domat, on nineteenth-century Anglo-American discussions of presumptive and circumstantial evidence, requires investigation.

147. J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (London 1827).

148. See W. TWINING, *supra* note 87, at 26. For a thorough discussion of the Benthamite approach to evidence, see *id.* at 19-108. Twining found Bentham's approach closer to that of Locke and Hume than to the "common sense school." *Id.* at 29.

149. For a synopsis of *The Rationale of Judicial Evidence*, see *id.*, at 28-47. For Bentham's use of degrees of persuasion and moral certainty, see *id.* at 55-56. See also Postema, *Fact, Fictions, and Law: Bentham on the Foundations of Evidence*, in *FACTS IN LAW* 37-64 (W. Twining ed. 1983) (Archives for the Philosophy of Law and Social Philosophy, Beicheft N.F. 16); Twining, *Rule Scepticism in Bentham's Theory of Evidence*, in *FACTS IN LAW* at 65-81.

150. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Form of Legal Literature*, 48 U. CHI. L. REV. 632-79 (1981); see also W. WILLS, *AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE* (3d ed. London 1857) (1st ed. London 1838). Wills' essay shares many features of the more general treatises. The essay was designed to investigate the foundations of our faith in circumstantial evidence and to demonstrate that circumstantial evidence is "a means of arriving at moral certainty." *Id.* at 274-75. Wills, who indicated his dependence on Bentham and Starkie, noted that the English cases could, like every other part of the "great system of jurisprudence," be reduced "to consistent and immutable principles of reason and natural justice." Wills began with a general treatment of the various kinds of evidence and the nature of the assurance produced by different kinds of evi-

probability, moral certainty, and degrees of assent, and attempted to ground their evidentiary standards on psychological and epistemological positions of the day.

This pattern is to be found in Simon Greenleaf's *Treatise on the Law of Evidence*, which was indebted to both Starkie and Phillips. This famous nineteenth-century American treatise followed the by then quite conventional pattern of beginning with a brief discussion of epistemology. In addition to incorporating the epistemological authorities cited by Starkie and Phillips, Greenleaf utilized Whately's *Logic*, Gambier's

dence. He wished to make the principles of legal evidence conform to the principles of evidence in philosophy, that is, to conform to the way one arrives at and draws conclusions from human knowledge. Judicial evidence is thus seen as part of logic. *Id.* at 135. Truth is of two kinds, "abstract and necessary," or probable and contingent, and each involves different kinds of evidence. Most truths are "probable," and have "no other guide than our own consciousness or the testimony of our fellow men." *Id.* at 16-17. This Wills labeled "moral evidence . . . probably because its principal application is to subjects directly or remotely connected with moral conduct and relations." Testimony is the "most comprehensive and important" basis of moral evidence; indeed, to treat the subject of testimony "would be to treat of the conduct of the understanding in relation to the greater portion of human affairs." *Id.* at 18. Wills' essay would thus be limited to the much smaller realm of circumstantial evidence. *Id.* at 18. In typical fashion, Wills distinguished moral evidence from demonstration and described the kind of certitude to be found in each. The degrees of certitude in the moral realm range from "moral certainty, the highest, . . . to that of mere probability, the lowest." *Id.* at 19. He then discussed probability, including both its mathematical and nonmathematical forms. Citing Dugald Stewart's *Elements* and the *Encyclopedia Britannica* article on Metaphysics, Wills noted that moral certainty was "that degree of assurance which induces a man of sound mind to act without doubt upon the conclusions to which it leads." *Id.* at 21. "[I]f evidence leave reasonable ground for doubt, the conclusion cannot be morally certain . . ." *Id.* at 22. The phrases "moral certainty" and "beyond reasonable doubt" are here inextricably intertwined. Wills' discussion of presumptions is deeply indebted to the writings of the Civilians. He also discussed the relationship between circumstantial and direct evidence, as well as the rules of induction which were specially applicable to circumstantial evidence. Rule 5 includes the reasonable doubt standard. Wills concluded that "moral certainty" was the appropriate standard for circumstantial evidence, and indicated its superiority to the continental codes, which prescribed precisely the kind and amount of evidence required for legal proof. *Id.* at 236.

W.M. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT WITH THE THEORY AND RULES OF PRESUMPTION OR CIRCUMSTANTIAL PROOF IN CRIMINAL CASES (Philadelphia 1845), similarly assumed that "a right perception of the theory and limits of legal presumption" requires at least some discussion of the nature of evidence, proof, and presumption. His work begins with a Lockean discussion of the nature of human knowledge. *Id.* at 1-2. He then distinguished between demonstration and probable reasoning or judgment and discussed their respective characteristics. *See id.* ch. 1, §§ 1-8. Best also adopted the moral certainty standard of Starkie. *Id.* § 195, Rule 1, at 155. One of his rules was that "evidence against the accused should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him." *Id.* § 210, Rule 3, at 168 (citing Starkie and Wills). But his indebtedness to the Civilians, which he took great pains to point out, was very great. He was also indebted to Bentham. Like many nineteenth-century writers on probable evidence, Best discussed the application of mathematical probabilities to judicial evidence. *See also* A. BURRILL, A TREATISE ON THE NATURE, PRINCIPLES AND RULES OF CIRCUMSTANTIAL EVIDENCE (New York 1856).

Guide to the Study of Moral Evidence, Abercrombie's *On the Intellectual Powers*, McKinnon's *Philosophy of Evidence*, and Reid's *Inquiry into the Human Mind* to support his discussion of the difference between mathematical and moral evidence, and his discussion of the "grounds of Belief."

Matters of fact are proved by *moral evidence* alone; by which is meant, not only that kind of evidence, which is employed on subjects connected with moral conduct, but all the evidence, which is not obtained either from intuition, or from demonstration. In the ordinary affairs of life, we do not require demonstrative evidence, . . . and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them. The *true question* therefore, in trials of fact, is not, whether it is possible that the testimony may be false, but whether there is a *sufficient probability* of its truth, that is whether the facts are shown by competent and satisfactory evidence By *satisfactory evidence* . . . is intended that amount of proof, which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances, which will amount to this degree of proof, can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man, and so to convince them, that he would venture to act upon that conviction, in the matters of the highest concern and importance to his own interest.¹⁵¹

What is interesting about Greenleaf's formulation, from a historical point of view, is that "satisfied mind" and "satisfied conscience," the formulas most common in seventeenth- and early eighteenth-century charges to the jury, were explicitly equated with the concept of "beyond reasonable doubt." Greenleaf, like most of his predecessors, also insisted that the courtroom shared its principles of evidence with the historian, the naturalist, the traveller, and the astronomer.¹⁵² Thus one of the bases of evidence, the connection between "collateral facts or circumstances, satisfactorily proved, and the fact in controversy," was viewed simply as the legal application "of a process familiar in natural philosophy, showing the truth of an hypothesis by its coincidence with existing phenomena."¹⁵³ The force of the connections and coincidences, which may be

151. S. GREENLEAF, TREATISE ON THE LAW OF EVIDENCE 4-5 (2d ed. Boston 1844) (emphasis in original). Greenleaf also noted that

our faith in human testimony, is sanctioned by experience; that is upon the generally experienced truth of the statements of men of integrity, having capacity and opportunity for observation, and truth. This belief is strengthened by our previous knowledge of the narrator's reputation for veracity; by the absence of conflicting testimony; and by the presence of that, which is corroborating and cumulative.

Id. at 14.

152. *Id.* at 14.

153. *Id.* at 15.

either physical or moral, thus "depends on their sufficiency to exclude every other hypothesis but the one under consideration."¹⁵⁴ Greenleaf also indicated that the doctrines of presumptive evidence which were so important to law were "shared . . . in common with other departments of science."¹⁵⁵

Although most early- and mid-nineteenth century treatises emphasized the similarity between legal reasoning and evidence and ordinary reasoning and evidence, it must be admitted that James Thayer's influential *A Preliminary Treatise on Evidence at the Common Law* represented a departure from this position. Because Thayer distinguished the evidentiary method of the law from that of the natural sciences and history, it is not surprising that he did not attempt to ground his treatise on the epistemological treatises of the day.¹⁵⁶

If Thayer represents something of a departure from earlier tradition, John Wigmore's monumental *The Principles of Judicial Proof as Given by Legal, Psychological, and General Experience*¹⁵⁷ is more typical of the treatises of earlier writers, with its emphasis on the close connections between legal evidence and ordinary reasoning. Indeed, Wigmore insisted that the principles of proof, the ratiocinative process of persuasion, were of far greater importance than the rules of admissibility. For Wigmore the principles of proof were "the natural processes of the mind in

154. *Id.*

155. *Id.* at 18; see also *id.* at 50-51, 54-55.

156. J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (1898). Thayer appears to have been of two minds as to whether or in what degree legal evidence and reasoning differ from that of other fields of inquiry. At one point his treatise distinguishes legal evidence from evidence of history and religion, *id.* at 284, and insists that legal evidence is concerned with what is admissible, not what is "logically probative." *Id.* at 268-69. Yet he also admitted that the rules of legal argument are "mainly an affair of logic and general experience, not legal precept," and do not call "into play any different faculties or involve any new principles or methods." *Id.* at 271. According to Thayer, legal reasoning does not differ "in any fundamental respect from any other reasoning," and lawyers possess no "peculiar organs or methods for tracking and apprehending the truth. What is called the 'legal mind' is still the human mind, and it must reason according to the laws of its constitution." *Id.* at 272. But for Thayer, if legal reasoning is "at bottom . . . like all other reasoning," there are nevertheless "a thousand practical considerations" which shape it. It is thus both the same and different, and he tended to emphasize the differences more than the similarities. Thayer thus represented something of a departure from previous thinkers. On the one hand, he differentiated legal reasoning from mathematical reasoning on the traditional ground that the law does not deal with demonstration and that it "deals with probabilities and not with certainties," but, unlike most of his predecessors, he also distinguished it from other types of evidence which deal with probabilities. *Id.* at 273-75. For Thayer's differentiation of the rules of evidence and the precepts of logic, see W. TWINING, *supra* note 87, at 6-8.

157. J. WIGMORE *THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LEGAL, PSYCHOLOGICAL, AND GENERAL EXPERIENCE* (2d ed. 1931). For an important recent discussion of Wigmore, see W. TWINING, *supra* note 87, at 109-66.

dealing with evidential facts after they are admitted to the jury; while the rules of admissibility represent artificial legal rules."¹⁵⁸ Indeed, Wigmore believed, albeit erroneously, that there had been very little interest in the principles of proof and that he was the first scholar since Bentham to emphasize those principles and to distinguish them from admissibility. It was the former that "bring[s] into play those reasoning processes which are already the possession of intelligent and educated persons."¹⁵⁹ William Twining, Wigmore's most recent analyst, has suggested, "Wigmore's epistemology . . . adopted without fuss or argument, a common sense empiricism in the tradition of Locke, Bentham, and John Stuart Mill."¹⁶⁰ As Twining has noted, Wigmore was especially anxious to introduce rationality into the field of evidence and to ground the principles of evidence and proof in the context of the best current knowledge about logic and psychology.¹⁶¹

IV

From the late seventeenth to at least the early twentieth century and beyond, most if not all legal scholars were devoted to showing that the standards of evidence and proof in the law conformed to the standards of evidence and proof available in all other forms of inquiry. The "beyond reasonable doubt and to a moral certainty" standard that has been so central to Anglo-American courts for well over a century was the result of this effort.

The "beyond reasonable doubt" standard articulated in both the cases and the evidence treatises stemmed from the late seventeenth-century cluster of ideas associated with the concept of moral certainty and with, to use Lockean terminology, the highest degree of probability. Once it became evident that trial by jury required the critical evaluation of witnesses, legal thinkers began to adopt current philosophical ideas about dealing with matters of fact. The writings of Wilkins, Tillotson, Boyle, and Locke, and later Paley, Hartley, Watt, Reid, Stewart, Gambier, Whately, and Mill thus played a major role in the evolution of Anglo-American concepts of evidence. Although one might wish to go behind these thinkers and investigate the contribution of scholastic philosophy and Roman law, there can be little doubt that eighteenth- and early nineteenth-century legal practitioners and writers attempted to

158. J. WIGMORE, *supra* note 157, at 3-5.

159. *Id.* at 5-6.

160. W. TWINING, *supra* note 87, at 125; *see also id.* at 114-16.

161. *Id.* at 116; *see also id.* at 119-22.

bring English law into conformity with the most advanced philosophical thought.

Early in the seventeenth century the concern for evaluating evidence was encapsulated in "satisfied conscience" or "satisfied belief" formulas that resonated to the moral and religious obligations of jurors serving under oath. During the seventeenth and eighteenth centuries, the concepts of probability, degrees of certainty, and moral certainty were poured into the old formulas so that they emerged at the end of the eighteenth century as the secular moral standard of "beyond reasonable doubt."

I am not suggesting that most technical rules of evidence flowed from philosophical principles, but rather that such rules, some of them old and venerable, could be modernized and defended through an alliance with contemporary philosophy. Thus allied, they might be viewed as both rational and in harmony with the best understanding of the human mind. In this way, selective use of philosophical formulations helped to secure continued legitimacy for the jury trial and the Anglo-American legal system.

Although this article is largely historical and has been primarily devoted to describing changes in Anglo-American criminal evidentiary standards and their relation to theories of knowledge, its findings are obviously relevant to contemporary dissatisfaction with current legal terminology. Before the legal profession and the legislatures move in the direction of modifying or eliminating such terminology, they ought to seriously consider whether it might be worth preserving the important intellectual developments that lie behind it. Despite the changes in terminology we have traced over the centuries, the goal has remained essentially the same. The earliest standards we have identified were "satisfied belief" and "satisfied conscience." They were succeeded by "satisfied mind" or "satisfied understanding," or something closely approximating them. Gradually this language, too, was replaced by the concept of "moral certainty" and "beyond reasonable doubt."

Throughout this development two ideas to be conveyed to the jury have remained central. The first idea is that there are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration, as when we say that the square of the hypotenuse of a right triangle is equal to the sum of the squares of the other two sides. In the other, which is the empirical realm of events, absolute certainty of this kind is not possible. The second idea is that, in this realm of events, just because absolute certainty is not possible, we ought not to treat everything as merely a guess or a matter of opinion.

Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of the evidence available to us increases. The highest level of certainty in this realm in which no absolute certainty is possible is what traditionally has been called moral certainty.

There is little doubt that "moral certainty" no longer conveys these two ideas, but it may be worthwhile to continue to convey them. To further that task I present the following proposed jury instruction as a supplement to a revised reasonable doubt instruction that omits "moral certainty":

We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean that you should not find the defendant guilty unless you have reached the highest level of certainty of the defendant's guilt that it is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom.

Surely experienced judges and legislators can improve on this language. I think the attempt ought to be made before we abandon a three-centuries-old tradition of seeking to explain to juries in simple language the theories that underlie Anglo-American culture and that ought to be identified in all processes of knowing, including knowing guilt or innocence.

